No. 79-491

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, APPELLANT

v.

DAVID ZBARAZ, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinions of the district court (Apps. A, D, and F, *infra*, 1a-22a, 54a-73a, 91a) are not reported. The opinions of the court of appeals (Apps. C and E, *infra*, 37a-53a, 74a-90a) are reported at 596 F.2d 196 and 572 F.2d 582.

JURISDICTION

The final judgment of the district court (App. B, *infra*, 23a-36a) was entered on April 30, 1979. The United States filed a notice of appeal on May 25, 1979 (App. G, *infra*, 92a-93a). On July 18, 1979,

Mr. Justice Stevens extended the time for docketing the appeal to and including September 22, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n.8 (1975); *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32 (1975).

QUESTION PRESENTED

The Hyde Amendment to the Department of Health, Education, and Welfare's appropriations act for fiscal year 1979, 92 Stat. 1586, prohibits the expenditure of federal Medicaid funds for abortions except in three circumstances: (1) where the mother's life would be endangered if the pregnancy were carried to term, (2) where, in the opinion of two physicians, "severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term," or (3) where the pregnant woman is the victim of reported rape or incest.

The question presented is whether the Hyde Amendment violates the equal protection component of the Due Process Clause of the Fifth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

Section 210 of the Act Making Appropriations for the Departments of Labor and Health, Education, and Welfare, and Related Agencies for the fiscal year ending September 30, 1979, and for other purposes, Pub. L. No. 95-480, 92 Stat. 1586, provides in pertinent part:

> None of the funds provided for in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

STATEMENT

1. Title XIX of the Social Security Act, as amended, 42 U.S.C. 1396 *et seq.*, establishes a medical assistance program, commonly known as "Medicaid," under which the federal government provides financial assistance to those states that choose to reimburse the costs of medical treatment for needy individuals. For a state to qualify for federal assistance under Title XIX, its Medicaid plan must reimburse expenses incurred by the "categorically needy" [1] with

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[1] The "categorically needy" group includes families with dependent children and the aged, blind, and disabled. 42 U.S.C.

respect to five general categories of medical treatment: (1) inpatient hospital services, (2) outpatient hospital services, (3) other laboratory and x-ray services, (4) skilled nursing facility services, periodic screening and diagnosis of children, and family planning services, and (5) physician's services. 42 U.S.C. 1396a(a)(13)(B), 1396d(a)(1)-(5).

Title XIX does not require participating states to provide payment for every medical treatment falling within the five general categories. The statute requires only that each state Medicaid plan "include reasonable standards * * * for determining eligibility for and the extent of medical assistance under the plan which * * * are consistent with the objectives of [Title XIX] * * *." 42 U.S.C. 1396a(a)(17)(A). The Act does not expressly require participating states to pay for the costs of abortions or any other particular medical procedures.[2] A federal regulation under the Act provides, however, that state Medicaid agencies "may not arbitrarily deny or reduce the amount, duration, or scope of a required service * * * to an otherwise eligible recipient

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1396a(a)(10)(A). The states may also choose to extend Medicaid coverage to other needy individuals, termed the "medically needy." 42 U.S.C. 1396a(a)(10)(C).

[2] Indeed, when Title XIX was added to the Social Security Act in 1965 (79 Stat. 344), most "medically necessary" abortions were illegal in most states. *Roe* v. *Wade*, 410 U.S. 113, 118 & n.2 (1973). This Court's rulings in *Wade* and its companion case, *Doe* v. *Bolton*, 410 U.S. 179 (1973), established the constitutional right of a woman to seek an abortion during the first trimester of pregnancy.

solely because of the diagnosis, type of illness, or condition." 42 C.F.R. 440.230(c)(1), as corrected, 43 Fed. Reg. 57253 (Dec. 7, 1978). The same regulation authorizes state agencies to "place appropriate limits on a service based on such criteria as medical necessity * * *." 42 C.F.R. 440.230(c)(2), as corrected, 43 Fed. Reg. 57253 (Dec. 7, 1978).

By statute, the State of Illinois prohibits medical assistance payments for abortions unless a physician determines that an abortion is "necessary for the preservation of the life of the woman." Ill. Ann. Stat. ch. 23, §§ 5-5, 6-1, 7-1 (Smith-Hurd 1979 Supp.). In the appropriations acts for the Department of Health, Education, and Welfare for fiscal years 1977, 1978, and 1979, Congress has included a provision that prohibits federal payments to the states for any abortions except those performed in certain limited, specified circumstances. The most recent version of this provision, commonly known as the Hyde Amendment after its original congressional sponsor, provides:

> None of the funds provided for in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother

would result if the pregnancy were carried to term when so determined by two physicians.[3]

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[3] The first version of the Hyde Amendment barred the use of federal funds for abortions "except where the life of the mother would be endangered if the fetus were carried to term." 90 Stat. 1434. For fiscal year 1978, the amendment was modified to include the additional exceptions for pregnancies resulting from rape or incest and pregnancies that would cause "severe and long-lasting physical health damage to the mother." 91 Stat. 1460. The amendment was then continued in virtually identical form for fiscal year 1979. 92 Stat. 1586. The restrictions apply to all HEW programs funded under the appropriations act.

The HEW appropriations bill for fiscal year 1980 has not yet been enacted into law, although each house of Congress has passed its own version of the bill. On June 27, 1979, the House passed H.R. 4389, Section 211 of which would return the Hyde Amendment to its original form, permitting federal funding for abortions only "where the life of the mother would be endangered if the fetus were carried to term." See 125 Cong. Rec. H5213-H5218, H5253-H5262 (daily ed. June 27, 1979); *id.* at H5456-H5457 (daily ed. June 28, 1979). Three weeks later, the Senate passed an amended version of H.R. 4389, Section 209 of which would continue in effect the current Hyde Amendment. 125 Cong. Rec. S9847, S9850-S9873 (daily ed. July 19, 1979); *id.* at S10048-S10049 (daily ed. July 20, 1979). The conference committee was unable to agree on the matter (H.R. Conf. Rep. No. 96-400, 96th Cong., 1st Sess. 26 (1979)), and the House insisted on its disagreement to the Senate's recommended retention of the Hyde Amendment in its present form. 125 Cong. Rec. H7109, H7131 (daily ed. Aug. 2, 1979). While it seems clear that some version of the Hyde Amendment will be included in the HEW appropriations act for fiscal year 1980, its exact language remains problematical. We will, of course, inform the Court promptly if Congress takes action that substantially affects the dispute in this case or renders the constitutional question moot.

2. In December 1977, two doctors whose medical practice includes performing abortions for indigent women filed this suit in the United States District Court for the Northern District of Illinois.[4] They sought a declaration that the Illinois statute barring state medical assistance payments for any abortions except those necessary to preserve the life of a pregnant woman violates Title XIX of the Social Security Act and the Equal Protection Clause of the Fourteenth Amendment. They also sought to enjoin enforcement of the Illinois statute. Plaintiffs argued that the Medicaid Act requires the funding of medically necessary abortions even if the woman's life is not in danger. They further contended that by imposing restrictions on the availability of funds for medically necessary abortions but not for other medically necessary operations, the Illinois statute impermissibly distinguishes among groups of indigent women in need of medical care.

The district court initially announced its intention to abstain from considering the complaint until the Illinois state courts had construed the challenged

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[4] Other plaintiffs are the Chicago Welfare Rights Organization, whose members include women dependent on Illinois medical assistance benefits, and Jane Doe, an indigent woman who seeks an abortion that is "medically necessary" but that is not required to save her life. The principal defendant is Arthur F. Quern, Director of the Illinois Department of Public Aid, the agency charged with administering the State's medical assistance programs. Two other doctors intervened as defendants on behalf of the Americans United for Life Legal Defense Fund (App. A, *infra*, 2a-3a).

statute (App. F, *infra*, 91a). The court of appeals reversed and remanded for consideration of plaintiffs' motion for preliminary injunctive relief and for further proceedings (App. E, *infra*, 74a-90a). On remand, the district court certified two plaintiff classes consisting of (1) all pregnant women eligible for aid under the Illinois medical assistance program "for whom an abortion is medically necessary, but not necessary for the preservation of their lives, and who wish such abortions performed," and (2) all Illinois physicians certified to obtain reimbursement for necessary medical services rendered to, and who perform medically necessary abortions for, persons eligible for assistance under the Illinois programs (App. D, *infra*, 58a-62a).

The district court held that Title XIX of the Social Security Act and the regulations thereunder require participating states to provide funding for all "medically necessary" abortions (App. D, *infra*, 62a-67a). The court ruled that the Hyde Amendment is only a limitation on the use of federal funds and does not change the substantive requirements of the Medicaid Act (*id.* at 66a). Accordingly, the court permanently enjoined the enforcement of the Illinois statute to the extent it would have denied payments for abortions that are "medically necessary or medically indicated according to the professional medical judgment of a licensed physician in Illinois, exercised in light of all factors affecting a woman's health" (*id.* at 66a-67a).

The court of appeals again reversed (App. C, *infra*, 37a-53a). Following the decision of the First Circuit in a similar challenge to the Massachusetts abortion funding law,[5] the court ruled that the Hyde Amendment "alters Title XIX in such a way as to allow states to limit funding to the categories of abortions specified in that amendment" (*id.* at 42a-43a). The court remanded with instructions that the permanent injunction previously entered by the district court be modified to require payments only "for those abortions fundable under the Hyde Amendment" (*id.* at 51a). The court of appeals also directed the district court to rule expeditiously on the constitutional questions it had not reached. In particular, the court of appeals stated (*id.* at 50a-51a; footnote omitted) that the district court should consider

> whether the Hyde Amendment, by limiting funding for abortions to certain circumstances even if such abortions are medically necessary, violates the Fifth Amendment in view of the facts that no other category of medically necessary care is subject to such constraints and that abortion has been recognized as a fundamental right.

3. On the second remand, the district court advised the Attorney General of the United States that the constitutionality of an Act of Congress had been drawn into question, and the United States inter-

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[5] *Preterm, Inc.* v. *Dukakis*, 591 F.2d 121 (1st Cir.), cert. denied, No. 78-1430 (May 14, 1979).

vened to defend the constitutionality of the Hyde Amendment. The district court held that the Hyde Amendment is unconstitutional to the extent that it permits states to participate in the Medicaid program without funding "medically necessary abortions prior to the point of fetal viability" (App. A, *infra*, 21a). The court determined on the basis of doctors' affidavits that "[m]ost health problems associated with pregnancy would not be covered" by the Hyde Amendment and "those that would be covered would often not be apparent until the later stages of pregnancy, when an abortion is more dangerous to the mother" (*id.* at 17a). The court inferred that if Medicaid funds are available only for those abortions covered by the Hyde Amendment, "[t]he effect * * * will be to increase substantially maternal morbidity and mortality among indigent pregnant women" (*ibid.*). In addition, the court observed that the Hyde Amendment criteria "completely ignore the very serious threats to an indigent pregnant woman's psychological or psychiatric health that may make an abortion medically necessary" (*id.* at 17a-18a n.11). The court concluded (*id.* at 20a) that

> a pregnant woman's interest in her health so outweighs any possible state interest in the life of a non-viable fetus that, for a woman medically in need of an abortion, the state's interest is not legitimate. At the point of viability, however, "the relative weights of the respective interests involved" shift, thereby legitimizing the state's interest. After that point, therefore, * * *

> a state may withhold funding for medically necessary abortions that are not life-preserving, even though it funds all other medically necessary operations.

Accordingly, the court held that the Hyde Amendment and the Illinois medical assistance law are unconstitutional as applied to "medically necessary abortions performed prior to fetal viability," and it enjoined defendants from denying payments for such abortions under the state programs (App. B, *infra*, 23a, 27a). The court did not enjoin any action by the United States.[6]

THE QUESTION IS SUBSTANTIAL

The district court has declared a federal statute unconstitutional. The underlying issue involved—the extent of mandatory federal and state financial assistance for abortions under the Medicaid Act—is a matter of considerable social and political importance. The question of the constitutionality of the original version of the Hyde Amendment was before this Court in *Califano* v. *McRae*, 433 U.S. 916 (1977). The Court vacated the district court's judgment that the statute impermissibly discriminated against indi-

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[6] The district court refused to stay its order, and the defendants and intervening doctors moved in this Court for a stay pending appeal (Nos. A-958 and A-967). On May 24, 1979, Mr. Justice Stevens denied the motions on the ground that the likely irreparable injury to the plaintiffs in the event a stay were granted outweighed the injury that the State would suffer if the district court's decision were permitted to remain in effect pending appeal.

gent women who chose to have abortions rather than carry their pregnancies to term and remanded for further consideration in light of *Maher* v. *Roe*, 432 U.S. 464 (1977), and *Beal* v. *Doe*, 432 U.S. 438 (1977). The district court in the present case had the benefit of the decisions in *Maher* and *Beal* but nonetheless concluded that Congress lacked a rational basis for its enactment of the most recent version of the Hyde Amendment. This Court should note probable jurisdiction to review the judgment below and to sustain the constitutionality of the legislative choice to provide federal funds for abortions only in certain limited circumstances.

Maher v. *Roe*, *supra*, 432 U.S. at 469, established that "[t]he Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents." [7] The district court noted that, "[a]s in *Maher*, plaintiffs here will encounter difficulty effectuating their decision to terminate a pregnancy not because of any [government] regulation, but because of their indigency" (App. A, *infra*, 11a). Following *Maher*, the court correctly ruled (*id.* at 12a-13a) that the funding limitation imposed by the Hyde Amendment does not infringe any "fundamental right" and that its validity must be judged under the "rational basis" test. Congress' decision to permit the use of federal funds for abortions only

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[7] Whether or not a state participates in the Medicaid program, it of course remains free to fund any medical services it wishes, including therapeutic and nontherapeutic abortions.

when the life of the pregnant woman is endangered, when she is the victim of rape or incest, or when she will suffer "severe and long-lasting physical health damage" if the pregnancy is carried to term must be sustained if the distinction between abortions and other "medically necessary" operations "rationally furthers some legitimate, articulated [government] purpose * * *." *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 17 (1973), quoted in *Maher* v. *Roe*, *supra*, 432 U.S. at 470. See also *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 312, 314 (1976); *Vance* v. *Bradley*, No. 77-1254 (Feb. 22, 1979), slip op. 3-4.

The Hyde Amendment satisfies this test. In forbidding the use of federal funds for any abortions other than those in certain limited categories, Congress was motivated by two legitimate concerns: the desire to encourage normal childbirth and to protect the potentiality of human life, and the desire to avoid spending tax revenues to support an activity that many taxpayers find morally repugnant. Representative Hyde, the sponsor of the original version of the appropriations amendment, stated that the measure was intended "to protect that most defenseless and innocent of human lives, the unborn * * *." 122 Cong. Rec. 20410 (1976). See also *id.* at 27676 (remarks of Sen. Stennis). Senator Buckley, a leading supporter of the amendment, declared that Congress should not

permit the expenditure of federal funds for a "procedure that appalls the conscience of a very substantial percentage of the American taxpayers." *Id.* at 27675. See also *id.* at 27673 (remarks of Sen. Helms) ("there are millions of Americans * * * who are opposed to the use of their tax dollars to promote [abortion]"); *id.* at 27679 (remarks of Sen. Bartlett) ("I just do not think * * * we should feel we have a right or an obligation to finance abortions, which are simply considered anathema by many, many people in this country").

This Court has repeatedly held, and the district court recognized, that the government has an "important and legitimate interest in protecting the potentiality of human life." *Roe* v. *Wade*, 410 U.S. 113, 162 (1973); *Beal* v. *Doe*, *supra*, 432 U.S. at 445-446; App. A, *infra*, 15a. In *Maher* v. *Roe*, *supra*, 432 U.S. at 478, for example, the court concluded that a state's strong and important interest in encouraging normal childbirth provides a rational basis for a legislative or administrative decision to subsidize costs incident to childbirth but not those associated with nontherapeutic abortions. See also *Poelker* v. *Doe*, 432 U.S. 519, 520 (1977) (sustaining a mayor's policy directive prohibiting the performance of abortions in city hospitals except in cases involving "a threat of grave physiological injury or death to the mother").

The district court ruled, however, that this substantial government interest is overborne when an abortion is medically necessary for the health of a pregnant woman and the fetus is not yet viable. App.

A, *infra*, 15a, 18a. The only justification that the court offered for this view was the assertion that application of the Hyde Amendment criteria for Medicaid funding of abortions will "increase substantially maternal morbidity and mortality among indigent pregnant women" (*id.* at 17a). This statement merely reflects the undisputed fact that there are competing values at stake in the process of congressional decisionmaking on the availability of Medicaid funds for abortions.

Based on its assessment of the weight that ought to be attached to the protection of a pregnant woman's health, a court might well conclude, as a policy matter, that public financial assistance should be made available for all medically necessary abortions sought by indigent women. But that does not mean that any other policy choice is irrational. By contrast to the district court, Congress has chosen to assign greater relative weight to the value of encouraging childbirth and preserving potential human life. For this reason, Congress has made federal funds available, not for all medically necessary abortions, but only in circumstances where the effect of continued pregnancy on the woman's health is likely to be particularly serious or where the pregnant woman is a victim of rape or incest. One may quarrel with Congress's policy choice, and a reviewing court might even conclude that Congress has acted unwisely. But such a conclusion would not imply that the Hyde Amendment lacks any rational basis. See, *e.g.*, *Maher*

v. *Roe, supra,* 432 U.S. at 479-480; *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 487-488 (1955).

By virtue of its strong and legitimate interest in encouraging childbirth, Congress could rationally choose not to fund any abortions. Congress has not gone that far. It has simply described more narrowly than plaintiffs and the district court would like the situations in which other interests outweigh the interest in protecting potential human life and thus justify the expenditure of public funds for abortions. The statute embodying that policy judgment is not vulnerable to constitutional attack on the ground that Congress has not imposed similar restrictions on other medically necessary procedures funded under the Medicaid Act.[8] Abortion is different from other

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[8] In fact, abortion is not the only "medically necessary" service for which federal Medicaid funds are sometimes unavailable to otherwise eligible claimants. Title XIX provides that, for patients between the ages of 21 and 65, federal funds shall not be used to pay for the cost of in-patient hospital care in institutions for tuberculosis or mental disease. 42 U.S.C. 1396d(a)(17)(B). At the same time, the statute does permit federal payments for out-patient psychiatric or tuberculosis care or in-patient psychiatric or tuberculosis care in a general hospital. Like the Hyde Amendment restrictions on the availability of federal funds for abortions, these statutory provisions permit the use of federal monies for one kind of medical treatment for a given condition, but not for another kind of treatment for the same condition. The constitutionality of the Medicaid provision dealing with the availability of funds for psychiatric services has been sustained in *Kantrowitz* v. *Weinberger,* 388 F. Supp. 1127 (D.D.C. 1974), aff'd, 530 F.2d 1034 (D.C. Cir.), cert. denied, 429 U.S. 819 (1976), and *Legion* v. *Richardson,* 354 F. Supp. 456 (S.D.N.Y.), aff'd, 414 U.S. 1058 (1973).

medical procedures because no other procedure involves "the termination of a potential human life." *Maher* v. *Roe*, *supra*, 432 U.S. at 480.

This Court has acknowledged that "not all distinction between abortion and other procedures is forbidden." *Bellotti* v. *Baird*, 428 U.S. 132, 149-150 (1976); *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 66-67, 80-81 (1976); *Bellotti* v. *Baird*, No. 78-329 (July 2, 1979) (plurality opinion), slip op. 25-26. Congress could legitimately decide, on the basis of its interest in protecting potential human life, to limit the availability of public funds for abortions but not for other medically necessary procedures. The constitutionality of such a limitation does not depend on whether an abortion is sought before or after the fetus is viable. In either event, the special characteristics of an abortion provide a rational basis for the imposition of funding restrictions not applicable to other medical services. The district court therefore erred in holding that the Hyde Amendment is "unconstitutional as applied to medically necessary abortions prior to the point of fetal viability" (App. A, *infra*, 21a).

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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SEPTEMBER 1979

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 77 C 4522

DAVID ZBARAZ, M.D., ET AL., PLAINTIFFS

v.

ARTHUR F. QUERN, ETC., DEFENDANT

MEMORANDUM OPINION

Plaintiffs brought this class action[1] under 42 U.S.C. Section 1983 to enjoin enforcement of a 1977 Illinois statute withdrawing medical assistance funding in Illinois for all abortions except those "necessary for the preservation of the life of the pregnant woman." P.A. 80-1091, Ill. Rev. Stat. Supp. (1977) ch. 23, Sections 5-5, 6-1, 7-1.[2] Plaintiffs are two

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[1] The classes certified by the district court consist of (1) all pregnant women eligible for the Illinois medical assistance programs for whom an abortion is medically necessary but not necessary for the preservation of their lives and who wish such abortion performed, and (2) all Illinois physicians who are certified to obtain reimbursement for necessary medical services rendered to, and who perform medically necessary abortions for, persons eligible for the Illinois medical assistance programs.

[2] Those sections provide, in relevant part:

> Sec. 5-5. The Illinois Department, by rule, shall determine the quantity and quality of the medical assistance for which payment will be authorized, and the medical

doctors who perform medically necessary, but not necessarily life-preserving abortions for indigent women; the Chicago Welfare Rights Organization, whose members include women dependent on Illinois medical assistance benefits; and Jane Doe, an indigent woman for whom an abortion is medically necessary but not necessary for the preservation of her life. Defendant Arthur Quern is the Director of the Illinois Department of Public Aid, the state agency responsible for administering Illinois medical assist-

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services to be provided, which may include all or part of the following: . . . but not including abortions, or induced miscarriages or premature births, unless, in the opinion of the physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.

Section 6-1. Nothing in this Article shall be construed to permit the granting of financial aid where the purpose of such aid is to obtain an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.

Section 7-1. Aid in meeting the costs of necessary medical, dental, hospital, boarding or nursing care, . . . except where such aid is for the purpose of obtaining an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a viable child and such procedure is necessary for the health of the mother or her unborn child.

ance programs. Intervenor-defendants include two doctors and the United States.

The complaint alleged that P.A. 80-1091 violated plaintiffs' rights under the Social Security Act, 42 U.S.C. Section 1396 et seq., and the Ninth and Fourteenth Amendments to the United States Constitution. Plaintiffs sought both declaratory and injunctive relief. The case was originally assigned to Judge Kirkland. On December 21, 1977, he ordered the proceedings stayed pending an interpretation of P.A. 80-1091 by an Illinois state court. Reasoning that the Illinois statute could be construed to be consistent with the Social Security Act, Judge Kirkland decided the exercise of federal jurisdiction at the time would be imprudent. He therefore merely entered and continued plaintiffs' motion for preliminary relief. (Memorandum Opinion and Order of December 21, 1977, at 3-5).

Plaintiffs appealed and the Seventh Circuit reversed. *Zbaraz* v. *Quern*, 572 F.2d 582 (7th Cir. 1978). In its ruling, the Court of Appeals declined to decide the merits of plaintiff's motion for a temporary restraining order and/or preliminary injunction. Instead, the court remanded the case to the district court for expeditious consideration of the question of preliminary relief.

On remand, Judge Kirkland held that by failing to cover "medically necessary" abortions, P.A. 80-1091 violated the Social Security Act and its implementing regulations. The court reasoned that Illinois' funding of only "life-preserving" abortions fell short

of its responsibilities under Title XIX to establish "reasonable standards . . . for determining . . . the extent of medical assistance under the plans which . . . are consistent with the objectives of [the Medicaid program]," 42 U.S.C. Section 1396(a)(17). The court noted that the prime objective of Medicaid is to "furnish medical assistance [to eligible persons] to meet the costs of necessary medical services." 42 U.S.C. Section 1396. (Memorandum Opinion of May 15, 1978, at 8-11).

In his decision, Judge Kirkland also considered the impact of the Hyde Amendment on a state's responsibilities under Title XIX. The Hyde Amendment, first enacted as a rider to the 1977 fiscal year budget for the Department of Health, Education and Welfare, provides:

> None of the funds provided for in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

Section 210 of Pub. L. 95-480; 92 Stat. 1586, Oct. 18, 1978. Judge Kirkland interpreted the Hyde Amendment as a prohibition on the use of federal funds rather than a substantive amendment to the Social

Security Act. A state's obligations under Title XIX to fund medically necessary abortions, Judge Kirkland thus concluded, survived passage of the Hyde Amendment. Judge Kirkland issued a permanent injunction restraining defendants from enforcing P.A. 80-1091 to deny payments under the Illinois medical assistance programs for therapeutic abortions. (Memorandum Opinion of May 15, 1978, at 11-12).

Defendants appealed and again the Seventh Circuit reversed. *Zbaraz* v. *Quern*, —— F.2d ——, No. 78-1669, February 13, 1979. Following the lead of the First Circuit Court of Appeals in *Preterm, Inc.* v. *Dukakis*, —— F.2d —— (1st Cir. Nos. 78-1324, 78-1325, and 78-1326, decided January 15, 1979), the court held that the Hyde Amendment, by singling out abortions as a category of care which would be funded only under certain narrow circumstances, conflicted unavoidably with Title XIX. Despite its seemingly unambiguous language and its location in an appropriations measure, therefore, the Seventh Circuit concluded that the Hyde Amendment was not just a limitation on the use of federal funds, but an amendment to Title XIX as well. (Slip Op. at 6). Since the Amendment removed all but a narrow category of abortions from Medicaid coverage, it effectively permitted states also to withhold funds from non-Hyde Amendment abortions (Slip Op. at 10).

The Court of Appeals recognized the constitutional questions raised by its holding [3] and remanded the

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[3] The Seventh Circuit included in its mandate a directive to pass on the constitutionality of the Hyde Amendment, even

case to the district court with directions to modify the permanent injunction and to decide the constitutional questions.[4] (Slip Op. at 11).

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though plaintiffs attack only the legality of an Illinois statute. After remand, therefore, the United States was permitted to intervene pursuant to 28 U.S.C. Section 2403(a). In its brief in support of the constitutionality of the Hyde Amendment, the United States suggested that the Seventh Circuit "viewed the federal and state legislation as inextricably intertwined." (Brief for the United States, at 4). Although we are not persuaded that the federal and state enactments are inseparable and would hesitate to inject into the proceeding the issue of the constitutionality of a law not directly under attack by plaintiffs, we are obviously constrained to obey the Seventh Circuit's mandate. Therefore, while our discussion of the constitutional questions will address only the Illinois statute, the same analysis applies to the Hyde Amendment and the relief granted will encompass both laws. We note that although the Fifth Amendment does not contain an express Equal Protection Clause, its Due Process Clause has been construed to incorporate equal protection guarantees. Weinberger v. Salfi, 422 U.S. 749, 770 (1975); Richardson v. Belcher, 404 U.S. 78, 81 (1971).

[4] The Seventh Circuit instructed the district court to determine whether the withholding of funds for "medically necessary" abortions violated the constitution. (Slip Op. at 11). Prior to P.A. 80-1091, Illinois funded "therapeutic" abortions, defined as "medically necessary or medically indicated according to the professional medical judgment of a licensed physician in Illinois, exercised in light of all factors affecting a woman's health." State of Illinois Dept. of Public Aid—Medical Assistance Program Handbook for Physicians, January, 1976, A-204. The Seventh Circuit adopted this definition of "therapeutic" without addressing the question of whether it was broader than "medically necessary." Judge Kirkland treated the two as synonymous. (See Order of May 15, 1978, at 10). Whether the terms "medically necessary" and "therapeutic" are coextensive is a question that is not merely of

Pursuant to the Seventh Circuit's mandate, Judge Kirkland modified his permanent injunction to require Illinois to fund under its medical assistance programs abortions which fall within the scope of the Hyde Amendment exceptions. (Minute Order entered February 15, 1979). Judge Kirkland set a briefing schedule, but then determined that for medical reasons he would be unable to give the case the "expeditious consideration" ordered by the Seventh Circuit. The case was reassigned to us on April 18, 1979.

Now pending are the parties' cross-motions for summary judgment and plaintiffs' motion for a temporary restraining order. The latter motion is a response by plaintiffs to the announced intention of the Illinois Department of Public Aid to deny reimbursements for all abortions except those which it is required to fund by Judge Kirkland's modified injunction—that is, abortions stilll covered under the Hyde Amendment—beginning May 1. For the rea-

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academic significance. If, by attacking the constitutionality of P.A. 80-1091, plaintiffs are advocating a return to the status quo ante, then presumably a decision in their favor would result in the funding of all "therapeutic" abortions. But as we read the complaint, plaintiffs seek funding for "medically necessary" abortions, whether or not that is broad enough to include all "therapeutic" abortions. This reading harmonizes with plaintiffs' theory of the case—that by funding "medically necessary" operations other than abortions, Illinois is denying plaintiffs equal protection of the laws. Accordingly, we will treat the action as an attack on Illinois' failure to fund "medically necessary" abortions.

sons which follow, we will grant partial summary judgment for both plaintiffs and defendants.

Although plaintiffs raised a number of constitutional issues in their complaint,[5] their principal argument is that, by imposing restrictions on the public funding of medically necessary abortions which are not imposed on other medically necessary operations, P.A. 80-1091 violates their rights to equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.[6] The framework for analyzing claims of alleged deprivations of equal protection is now well-established:

> We must decide, first, whether [the statute] operates to the disadvantage of some suspect class or impinges upon a fundamental right ex-

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[5] Plaintiffs also alleged that P.A. 80-1091 violated the Establishment and Free Exercise Clauses of the First Amendment to the Constitution made applicable to the states by the Fourteenth Amendment, and the Due Process Clause of the Fourteenth Amendment. (Complaint, par. 22(d)). Plaintiffs' due process claim rests on their argument that the statute disrupts "the carefully constructed balance of constitutional interests Wade and its progency established." (Memorandum in Support of Motion for Summary Judgment, at 22). We believe this contention is subsumed under their equal protection challenge, and we will not treat it separately in this opinion.

[6] Plaintiffs have also challenged as unconstitutional the reporting requirement for rape victims. None of the plaintiffs, however, have asserted any personal stake in the determination of this issue. Where, as here, a statute contains separable provisions, a person may challenge only those provisions which operate to injure him, and may not challenge those provisions that cause him no harm. *See* Bell v. Hongisto, 501 F.2d 346 (9th Cir. 1974), *cert. denied* 420 U.S. 962 (1975).

> plicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. . . . If not, the [legislative] scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination. . . .

San Antonio School District v. *Rodriguez*, 411 U.S. 1, 17 (1973).

Relying on *Roe* v. *Wade*, 410 U.S. 113 (1973) and subsequent abortion decisions, plaintiffs contend that strict judicial scrutiny is appropriate here because a fundamental right is implicated. In *Roe*, the Supreme Court struck down a Texas statute that made criminal the performance or procurement of an abortion unnecessary to save a mother's life. The Texas legislation was constitutionally infirm, the Court held, because for every stage of a woman's pregnancy, it subordinated the woman's right to privacy, a right which "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," to the state's interests in preserving maternal health and promoting fetal life. 410 U.S. at 153. The Court emphasized, however, that although the right of personal privacy "includes the abortion decision . . . this right is not unqualified and must be considered against important state interests in regulation." 410 U.S. at 154. *See also*, *Doe* v. *Bolton*, 410 U.S. 179, 189 (1973).

Thus, the right recognized in *Roe* is not an affirmative right to an abortion, but is simply a right to

make and effectuate the abortion decision, at least in the first trimester of pregnancy, free from governmental regulation. During the second trimester, a state may restrict the effectuation of that decision only in a manner that reasonably promotes the health of the mother. After the fetus has achieved viability, a state may constitutionally proscribe abortion "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." 410 U.S. at 164, 165.

Plaintiffs argue here that by erecting a "substantial impediment to poor women's obtaining medically necessary abortions," P.A. 80-1091 restricts the effectuation of their decision to "bear or beget a child," and thereby triggers strict scrutiny. We believe this argument has been explicitly rejected by the United tSates Supreme Court in *Maher* v. *Roe*, 432 U.S. 464, 470 (1977), and is therefore foreclosed to plaintiffs here. In *Maher*, the Supreme Court held that the Constitution does not require a state participating in Social Security to pay for nontherapeutic abortions although it pays the expenses of childbirth. Plaintiffs in *Maher* argued that the Connecticut medical assistance scheme infringed upon their fundamental rights as announced in *Roe* v. *Wade*. Rejecting this contention, the Court observed:

> [Roe] implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion and to implement that judgment by the allocation of public funds.
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> * * * * *

> The indigency that may make it difficult—and in some cases, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.
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> * * * * *
>
> There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.

432 U.S. at 474, 475.

As in *Maher*, plaintiffs here will encounter difficulty effectuating their decision to terminate a pregnancy not because of any state regulation, but because of their indigency. *Maher* compels the conclusion, therefore, that P.A. 80-1091 impinges upon no fundamental right and should not be subjected to strict judicial scrutiny.[7]

In further support of their argument that strict scrutiny is appropriate here, plaintiffs analogize to the case of *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). There the Supreme Court declared unconstitutional various state statutory provisions which denied welfare assistance to persons who had not satisfied one year residency requirements, but who were otherwise eligible for welfare benefits. The Court

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[7] Plaintiffs apparently do not argue that P.A. 80-1091 creates a "suspect classification." This argument would also be unavailing under *Maher*. There the Supreme Court stated that, "This Court has never held that financial need alone identifies a suspect class for purposes of Equal Protection." 432 U.S. at 470.

reasoned that by treating indigents who had resided in the state less than a year differently from those who had satisfied the residency requirement, the state was penalizing indigents' rights to migrate, or travel interstate. Since the right to travel interstate was deemed "fundamental," the Court subjected the statutes to strict scrutiny. Finding no compeling justification for treating one year residents differently, the Court concluded that the statutes were unconstitutional. The Court noted that if the purpose of the provisions was to deter migration, or prevent an influx of indigents seeking higher welfare benefits, those purposes were "constitutionally impermissible." 394 U.S. at 631.

In this case, plaintiffs contend that Illinois is penalizing indigent women who desire to exercise their right to effectuate the abortion decision. We believe that again *Maher* disposes of this argument. As the *Maher* Court observed:

> [T]he claim here is that the State "penalizes" the woman's decision to have an abortion by refusing to pay for it. Shapiro and Maricopa County did not hold that States would penalize the right to travel interstate by refusing to pay the bus fares of the indigent travelers. We find no support in the right-to-travel cases for the view that Connecticut must show a compelling interest for its decision not to fund elective abortions.

432 U.S. n. 8 at 475. Since there is no fundamental right to a publicly funded abortion, the analogy to

Shapiro fails, "penalty analysis" does not apply, and strict scrutiny is unnecessary.

Our determination that P.A. 80-1091 should not be subjected to strict judicial scrutiny, however, does not resolve the question of the statute's constitutionality. Whenever a statute treats different classes of individuals differently, that legislative line-drawing is properly the subject of judicial examination. *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 17 (1973). Here, since indigent women in medical need of abortions are treated differently than indigent women in medical need of other surgical procedures, we must subject the statute to the rational relationship test. Under this test, the statute passes constitutional muster only if we can conclude that the legislative classification rationally furthers some legitimate, articulated state purpose. *Id.* As the Supreme Court observed in *Maher*, in applying the identical test,

> The Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents. But when a State decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations.

432 U.S. at 469-70.

The various defendants have suggested that the statute is supported by the state's legitimate interests in "fiscal frugality" and in protecting fetal life

through the encouragement of childbirth. While the allocation of limited public funds is a legitimate interest of the state, *see generally, Dandridge* v. *Williams*, 397 U.S. 471, 487 (1970), we do not believe that the Illinois funding policy is rationally related to this purpose. In fact, the record in this case supports the contrary conclusion that the costs of prenatal care, childbirth and postpartum care are substantially higher than the cost of abortions.[8] All of the births in question involve women who have encouraged complications in their pregnancies, which would presumably increase the cost of needed medical care. Of course, if the newborn child then receives public aid, the cost differential is even greater. The Illinois General Assembly was well aware of these potential cost differences, as shown by the remarks of Senator Lemke, Senate sponsor of P.A. 80-1091:

> My people don't want abortions being performed with their money. If it costs them more to support these children after they're born, they will pay that money gladly as long as it's properly used.

Debate on H.B. 333, Illinois Senate, June 27, 1977. In short, P.A. 80-1091 was not, and could not be, motivated by economic concerns.

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[8] Plaintiffs have produced convincing statistical evidence that the average State payment for an abortion is approximately $145.00, compared to an average cost to the State of $1,372.00 for funding a childbirth.

The other state interest offered in support of the state classification is the protection of the fetus through the encouragement of childbirth. The Supreme Court has recognized this as a legitimate state interest in some circumstances. *See Maher* v. *Roe*, 432 U.S. 464 (1977); *Poelker* v. *Doe*, 432 U.S. 519 (1977); *Roe* v. *Wade*, 410 U.S. 113 (1973). In *Maher*, the Court held that Connecticut could encourage "normal childbirth" by subsidizing the costs incident to childbirth while, at the same time, refusing to expend funds for *nontherapeutic* (purely elective) abortions. The Connecticut statute differed from the Illinois statute challenged here because it provided the funding of "medically necessary" abortions. We believe this distinction to be crucial to the determination of this case.

Under *Maher*, a state may legitimately prefer childbirth to an elective abortion. We do not believe, however, that a state has a legitimate interest in promoting the life of a non-viable fetus in a woman for whom an abortion is medically necessary.[9] This

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[9] Poelker v. Doe, 432 U.S. 519 (1977), does not require a contrary result. There a woman challenged a city policy that prohibited the performance of abortions in city-owned hospitals for reasons other than to save the mother from grave physiological injury or death. When plaintiff was examined by hospital physicians, however, physicians could not find "*any* medical reasons to justify an abortion," such as "severe sickness of the patient." 515 F.2d at 543. Accordingly, the Court of Appeals treated the case as one where plaintiff demanded a "nontherapeutic" abortion. 515 F.2d at 545. When the case was appealed, the Supreme Court adopted the lower court's characterization of the issue in upholding the city

approach, which recognizes that the fetus is being carried within a living, human being, is consistent with Supreme Court decisions which suggest that the interest in the fetus cannot be isolated from the interest in the health of the mother. *See generally, Roe* v. *Wade*, 410 U.S. at 159; *Colautti* v. *Franklin*, 99 S.Ct. 675, 688 (1979).[10]

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policy. 432 U.S. at 521. Because the Court viewed plaintiff's argument as an attack on the city's withholding of city-owned facilities for elective, or nontherapeutic abortions, *Maher* or course controlled. In this case, the plaintiff class is defined in terms of indigent women for whom abortions are medically necessary. We agree with plaintiffs that the Supreme Court could not have intended in its per curiam *Poelker* decision to obliterate the distinction it had carefully drawn in *Maher* between medically necessary and nontherapeutic abortions. We note, however, that at least two district courts have given Poelker v. Doe the sweeping interpretation we reject here. Doe v. Mundy, 441 F. Supp. 447, 451-52 (E.D. Wis. 1977); Frieman v. Walsh, No. 77-4171-CV-C (W.D. Mo. filed January 26, 1979).

[10] Colautti v. Franklin, 99 S.Ct. 675 (1979) involved a challenge to a Pennsylvania statute which subjected a physician who performed an abortion to potential criminal liability if he failed to utilize a statutorily prescribed technique when the fetus was "viable," or when there was sufficient reason to believe that the fetus was viable. The Court stated:

> Moreover, the second part of the standard directs the physician to employ the abortion technique best suited to fetal survival "so long as a different technique would not be *necessary* in order to preserve the life or health of the mother" (emphasis supplied). In this context, the word "necessary" suggests that a particular technique must be indispensable to the woman's life or health—not merely desirable—before it may be adopted.
>
> * * * * *
>
> Consequently, it is uncertain whether the statute permits the physician to consider his duty to the patient to be

As a consequence of the state's viewing the fetus apart from the mother, the mother may be subjected to considerable risk of severe medical problems, which may even result in her death. Under the Hyde Amendment standard, a doctor may not certify a woman as being eligible for a publicly funded abortion except where "the life of the mother would be endangered . . . or . . . where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term. . . ." Most health problems associated with pregnancy would not be covered by this language, (Affidavit of Dr. Oren Richard Depp, p. 10, affidavit of Dr. David Zbaraz), and those that would be covered would often not be apparent until the later stages of pregnancy, when an abortion is more dangerous to the mother (affidavit of Dr. Depp, pp. 4-5). At the earlier stages of pregnancy, and even at the later stages doctors are usually unable to determine the degree of injury which may result from a particular medical condition (*id.* at 4). The effect of the new criteria, then, will be to increase substantially maternal morbidity and mortality among indigent pregnant women (*id.* at 12).[11]

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paramount to his duty to the fetus, or whether it requires the physician to make a "trade-off" between the woman's health and additional percentage points of fetal survival. Serious ethical and constitutional difficulties, that we do not address, lurk behind this ambiguity.

[11] Moreover, the new Illinois criteria completely ignore the very serious threats to an indigent pregnant woman's psychological or psychiatric health that may make an abortion

We cannot hold that the state has a legitimate interest in preserving the life of a non-viable fetus at the cost of increased maternal morbidity and mortality among indigent pregnant women. In *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974), the Supreme Court was faced with a challenge to an Arizona statute which required one year's residence in a county as a condition to receiving non-emergency hospitalization or medical care at the county's expense. In striking down the state statute as infringing on the fundamental right to interstate travel, the Supreme Court stated:

> Evaro was an indigent person who *required* continued medical care for the preservation of his health and well being . . ., even if he did not require immediate emergency care. The State could not deny Evaro care just because, although gasping for breath, he was not in immediate danger of stopping breathing altogether. To allow a serious illness to go untreated until it requires emergency hospitalization is to subject the sufferer to the danger of a substantial and irrevocable deterioration in his health. Cancer, heart disease, or respiratory illness, if untreated for a year, may become all but irreversible paths to pain, disability, and even loss of life. The denial

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medically necessary. One doctor has estimated that approximately 15 per cent of a representative group of women desiring abortions have a psychiatric need for an abortion. He also concluded that indigent women are more likely than are non-indigent women to suffer adverse mental health consequences from unwanted pregnancy. (Affidavit of Dr. Peter Barglow, at 4, 6).

> of medical care is all the more *cruel* in this context, falling as it does on indigents who are often without the means to obtain alternative treatment.

415 U.S. at 260-61 (emphasis added). Like the Arizona statute in *Maricopa County*, the Illinois statute as modified will deny needed medical aid to indigent mothers until the point when a doctor is able to certify that the mother's life is endangered or when severe and long-lasting physical health damage [12] appears certain to occur.

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[12] The affidavits submitted by plaintiffs give many examples of medical conditions which would not be covered by the new Illinois standards, but which could pose a great threat to the safety of the mother. For example, the affidavit of Dr. David Zbaraz states, at pp. 5-6:

> The lack of certainty about predictions extends to even the most serious of potentially life-threatening conditions. For example, women with sickle cell disease have a 25 per cent probability of going into sickle cell crisis and dying as a result of pregnancy. (The normal pregnancy mortality rate is 20 per 100,000). Because of this extraordinarily high mortality rate, abortions for women with sickle cell disease are almost universally acknowledged to be "medically necessary." I would thus actively counsel such women to have abortions, unless they expressed a very strong desire to have the child. Yet it simply cannot be known, however careful her care and physician's monitoring, whether a particular patient will go into crisis, or whether the state of her disease will remain unaffected by pregnancy. It would not be proper medical care to wait for such an actual threat before terminating the pregnancy, if the patient did not want to incur the risk. Yet the Illinois standard, by requiring certainty about the outcome of a pregnancy, does not comprehend this inherent uncertainty in medical judgment prior to the onset of actual health crises.

Action that the Supreme Court characterized as "cruel" in *Maricopa County* can hardly be considered as a permissible side effect of a "legitimate" state interest in the present case.

As the Supreme Court recognized in *Roe*, however, the state's interest in promoting fetal life grows with the length of the pregnancy. At any point in the pregnancy term, the strength of the state's interest can only be determined by balancing "the relative weight of the respective interests involved." *Roe* v. *Wade*, 410 U.S. at 165. After the point of viability, for instance, that interest is regarded as "compelling," and justifies the proscription of abortion, except when it is necessary to preserve the life or health of the mother. 410 U.S. at 164.

Similarly, the state's interest in promoting the life of a fetus carried in a woman for whom an abortion is medically necessary is not constant. For the reasons just discussed, a pregnant woman's interest in her health so outweighs any possible state interest in the life of a non-viable fetus that, for a woman medically in need of an abortion, the state's interest is not legitimate. At the point of viability, however, "the relative weights of the respective interests involved" shift, thereby legitimizing the state's interest. After that point, therefore, we believe a state may withhold funding for medically necessary abortions that are not life-preserving, even though it funds all other medically necessary operations. We thus conclude that, as it applies to the abortion of a viable fetus, P.A. 80-1091 (as modified by court order) is constitutional.

We recognize that, as with any standard that relies on the judgment of the individual administering it, "medical necessity" may be subject to deliberate misinterpretation and abuse. Some would argue that unscrupulous physicians, with the active encouragement of their indigent patients, will transform our decision into a *de facto* order that the state fund purely elective abortions. Such a result would, of course, be squarely contrary to the Supreme Court's *Maher* decision. Nonetheless, we believe the inherent elasticity of the standard we adopt today will pose no greater problem to the state's administration of its medical assistance programs than it did under the funding scheme that preceded P.A. 80-1091. Furthermore, we are encouraged by affidavits submitted by respected members of the medical profession that suggest that the percentage of abortions any physician would deem "medically necessary" may be as low as one fifth of the representative cases in which a pregnant woman desires an abortion. (Affidavit of Dr. Oren Depp, at 7). Finally, we note that providers of services under Illinois medical assistance programs are subject to civil and criminal penalties for filing false Medicaid reimbursement reports. 42 U.S.C. Section 1396h; Ill. Rev. Stat. ch. 23, Sections 12-15, 12-15.1.

CONCLUSION

We hold that the Hyde Amendment and P.A. 80-1091 are unconstitutional as applied to medically necessary abortions prior to the point of fetal viability.

All parties are to appear on Monday, April 30, 1979, at 9:30 a.m. to discuss the problems of relief and notice. Plaintiffs are to prepare an appropriate judgment order and order granting injunctive relief for submission to the court on Monday, April 30, 1979.

DATED: April 29, 1978 [*sic*]

ENTER:

/s/ John F. Grady
JOHN F. GRADY
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 77 C 4522

DAVID ZBARAZ, M.D., ET AL., PLAINTIFFS

vs.

ARTHUR F. QUERN, ETC., ET AL., DEFENDANTS

FINAL JUDGMENT AND ORDER

On April 27, 1979, this Court issued a Memorandum Opinion which, *inter alia*, held Illinois' intended policy of denying reimbursement for all abortions under its medical assistance programs except those which it is required to fund under the District Court's modified injunction of February 15, 1979, unconstitutional as applied to medically necessary abortions performed prior to fetal viability. The District Court's previous May 15, 1978 Judgment and its June 13, 1978 Judgment, as modified by this February 15, 1979 Order, remain in force. But this Court directed plaintiffs to prepare an appropriate judgment order and order granting injunctive relief incident to the April 27, 1979 Memorandum Opinion for submission on April 30, 1979. Plaintiffs have done so. This Court has considered plaintiffs' proposed Decree, and now hereby ORDERS, ADJUDGES AND DECREES THAT:

1. This Court has jurisdiction over this case under 28 U.S.C. §§ 1343(3) and (4).

2. As used in this Judgment and Order, the following terms have the meanings indicated—

(a) "Recognized and legal medical providers" means all persons or institutions in Illinois who are certified to obtain reimbursement for medical services under the Illinois medical assistance programs;

(b) "Illinois medical assistance programs" means the Medicaid, state-funded General Assistance and Aid to the Medically Indigent programs, established pursuant to Ill. Rev. Stat., ch. 23, Arts. V-VII;

(c) "Indigent pregnant women" means pregnant women eligible for assistance under the Illinois medical assistance programs;

(d) "Medically necessary" as modifying "abortion" means an abortion which is necessary for the preservation of the life or the physical or mental health of a woman seeking such treatment, in the professional judgment of a licensed physician in Illinois, exercised in light of all factors relevant to her health.

(e) "Illinois' restrictive abortion funding policy" means the policy Illinois adopted pursuant to P.A. 80-1091, Ill.Rev. Stat. Supp. (1977), ch. 23, §§ 5-5, 6-1, 7-1, as modified by the District Court Order of February 15, 1979, and as described in the notices attached hereto as Exhibits A and B;

(f) "Fetal viability" means the point during pregnancy at which, in the professional judgment of a licensed physician in Illinois, a fetus is potentially able to live outside the mother's womb, albeit with artificial aid, such that there is a potentiality for meaningful life, not merely momentary survival.

3. There are two plaintiff classes herein, certified pursuant to F.R.C.P. 23(a) and (b)(2). They consist of:

(a) all pregnant women eligible for the Illinois medical assistance programs for whom an abortion is medically necessary but not necessary for the preservation of their lives and who wish such abortion performed, and

(b) all Illinois physicians who are certified to obtain reimbursement for necessary medical services rendered to, and who perform medically necessary abortions for, persons eligible for the Illinois medical assistance programs.

4. Partial summary judgment is granted to both plaintiffs and defendants, as follows—

(a) Partial summary judgment is granted to plantiffs that:

(i) Illinois' restrictive abortion funding policy and P.A. 80-1091, Ill. Rev. Stat. Supp. (1977), ch. 23, §§5-5, 6-1, 7-1, as applied by Illinois to deny funding, under the Illinois medical assistance programs, for medically necessary abortions performed prior to fetal viability, violate the equal protec-

tion clause of the Fourteenth Amendment to the United States Constitution;

(ii) The Hyde Amendment [Pub. L. 95-480, §210, 92 Stat. 1586 (1978)], as construed by the 7th Circuit in *Zbaraz* v. *Quern*, ——F.2d —— (Feb. 13, 1979) to permit Illinois to deny funding, under its Medical Assistance ("Medicaid") Program [Ill. Rev. Stat. ch. 23, Art. V; 42 U.S.C. §§1396ff.] for any medically necessary abortion performed prior to fetal viability, violates the Fifth Amendment to the United States Constitution.

(b) Partial summary judgment is granted to defendants that:

(i) Illinois' restrictive abortion funding policy and P.A. 80-1091, Ill. Rev. Stat. Supp. (1977), ch. 23, §§5-5, 6-1, 7-1, as applied by Illinois to deny funding under the Illinois medical assistance programs, for medically necessary abortions performed after fetal viability, do not violate the equal protection clause of the Fourteenth Amendment to the United States Constitution.

(ii) The Hyde Amendment [Pub. L. 95-480, §210, 92 Stat. 1586 (1978)], as construed by the 7th Circuit in *Zbaraz* v. *Quern*, ——F.2d —— (Feb. 13, 1979) to permit Illinois to deny funding, under its Medical Assistance ("Medicaid") Program [Ill. Rev. Stat. ch. 23, Art. V; 42 U.S.C. §§1396ff.] for any medically necessary abortion performed after fetal viability, does not violate the Fifth Amendment to the United States Constitution.

5. Illinois' restrictive abortion funding policy and P.A. 80-1091, Ill. Rev. Stat. Supp. (1977), ch. 23, §§ 5-5, 6-1, 7-1, as applied to deny funding, under the Illinois Medical assistance programs, for medically necessary abortions performed prior to fetal viability, are, pursuant to 28 U.S.C. § 2201, declared to violate the equal protection clause of the Fourteenth Amendment to the United States Constitution. The Hyde Amendment [Pub. L. 95-480, § 210, 92 Stat. 1586 (1978)], as construed by the 7th Circuit in *Zbaraz* v. *Quern*, —— F.2d —— (Feb. 13, 1979) to permit Illinois to deny funding, under its Medical Assistance ("Medicaid") Program [Ill. Rev. Stat. ch. 23, Art. V; 42 U.S.C. §§ 1396ff.] for any medically necessary abortion performed prior to fetal viability, is, pursuant to 28 U.S.C. § 2201, declared to violate the Fifth Amendment to the United States Constitution.

6. Defendant Arthur F. Quern, his agents, employees and all persons in active concert with him are permanently enjoined from—

(a) enforcing Illinois' restrictive funding policy and P.A. 80-1091, Ill. Rev. Stat. Supp. (1977), ch. 23, §§5-5, 6-1, 7-1, to deny payments under the Illinois medical assistance programs to any recognized and legal providers for the rendition of medical services to indigent pregnant women for medically necessary abortions performed prior to fetal viability, or to deny such payments on behalf of any such indigent pregnant women for such abortions; and

(b) directing notice to any recognized and legal medical providers, or to persons receiving assistance under the Illinois medical assistance programs, that any medically necessary abortions performed prior to fetal viability, are not, or will not be, a covered service under the Illinois medical assistance programs.

7. Within 21 days from the entry of this Decree, or within such additional time as this Court may allow, defendant Quern is ORDERED TO—

(a) direct, by first-class mail, to all recognized and legal medical providers notices, certification forms, and revisions to the Handbook for Physicians, which explain, completely, the terms of ¶ 6(a) herein, and of the means by which such providers can secure reimbursement for medically necessary abortion services. (Defendant is further ORDERED to furnish such notices, forms and revisions to plaintiffs' attorneys at least seven working days prior to their official promulgation.);

(b) direct, by first-class mail, the notice attached hereto as Exhibit C (printed in English and Spanish) to all Illinois medical assistance program recipients who may be affected by this Decree.

8. (a) The question of defendants' liability for attorneys' fees, and the amount of such fees to plaintiffs, is reserved until further order of this Court. Plaintiffs need not submit

any claim for attorneys' fees until such time as this Court considers this question.

(b) Costs are awarded to plaintiffs.

ENTER:

/s/ John F. Grady
JOHN F. GRADY
United States District Judge

DATED: Apr. 30, 1979

EXHIBIT "A"

STATE OF ILLINOIS
DEPARTMENT OF PUBLIC AID

NOTICE

To: Physicians, Hospitals and Ambulatory Surgical Centers

From: Illinois Department of Public Aid

Re: Reimbursement for Abortions

Effective May 1, 1979, the Department of Public Aid, under Illinois law, as limited by the federal court, cannot pay for abortions except for three (3) specific reasons which are coded and described below. Payment can only be made after receipt of the new document "Application For Payment For Abortion", Form DPA 1117, which must be submitted with the billing form.

When billing on Form DPA 032, Physician's Statement of Services Rendered, for induced abortions that are reimbursable by the Department, please use the appropriate procedure code. The codes are as follows:

Code 59730 Mother's Life Endangered

The professional judgment of the physician that the life of the mother would be endangered if the fetus were carried to term.

Code 59740 Severe and Long Lasting Health Damage

The professional judgment of the physician that severe and long lasting physical health damage to the mother would result if the pregnancy were carried to term.

Code 59750 Rape or Incest

Illinois state law as limited by the federal court prohibits Medicaid payment for abortions for rape or incest unless the abortion would meet certain federal financial participation requirements, including the requirement that Illinois Department of Public Aid must receive signed documentation from a law enforcement agency or public health service stating:

a) The person upon whom the medical procedure was performed was reported to have been the victim of an incident of rape or incest;

b) The date on which the incident occurred;

c) The date on which the report was made which must have been within 60 days of the date in which the incident occurred;

d) The name and address of the victim and the name and address of the person making the report (if different from the victim); and

e) That the report include the signature of the person who reported the incident.

The Department of Health, Education and Welfare has stated that a provider who performs the procedure without having the necessary docu-

mentation in hand does so at the risk of not receiving payment if the documentation is not forthcoming to the Illinois Department of Public Aid. The Illinois Department of Public Aid will pay for abortions required because of rape or incest only when it has received the federally required documentation, or if the abortion was also necessary for the other federally reimbursable reasons as previously defined.

Hospitals, when billing the Department of Public Aid for abortions as defined in this release, are to attach a copy of the completed Application for Payment for Abortion, Form DPA 2217, to the hospital billing statement.

Attached is a copy of the Application for Payment for Abortion, Form DPA 2217. Form 1862 and any revised editions of Form 1862 will be obsolete and should not be used for services rendered after May 1, 1979.

Supplies of the Application for Payment for Abortion are maintained centrally and may be obtained by writing:

Provider Services Section
Post Office Box 4034
Springfield, Illinois 62708

If you wish, you may call (217) 782-1426.

EXHIBIT "B"

STATE OF ILLINOIS
DEPARTMENT OF PUBLIC AID

To: Recipients of AFDC, AABD, MANG, GA or AMI, or Foster Care

Re: Abortion Services Date: March 22, 1979

The Illinois Department of Public Aid will no longer pay for abortions performed on or after May 1, 1979, under any of the medical programs it administers, except where

(a) a doctor has determined that the life of the mother would be endangered if the fetus were carried to term; or

(b) two doctors have determined that severe and long lasting physical health damage to the mother would result if the pregnancy were carried to term; or

(c) the abortion (or other medical procedure) is necessary for a victim of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service.

NOTE: This report must be made within 60 days of the incident and must show the name and address of the victim and the date of the incident. It must show the name, address and signature of the person making the report and the date of the report.

Doctors and hospitals will not be able to accept medical identification cards for abortions except as specified above.

This action is being taken because state law (Ill. Rev. Stat. Ch. 5-5, 6-1 and 7-1), as limited by federal court rulings, prohibits IDPA from paying for any abortions other than those specified above.

YOU HAVE THE RIGHT TO APPEAL THIS DECISION

At any time, within 60 days following the above "DATE" you have the right to appeal this decision and be given a fair hearing. Such an appeal must be in writing and filed with the Department. You may represent yourself at this hearing or you may be represented by any one else, such as a lawyer, relative or friend. Your local office will provide you with an appeal form and will help you fill it out if you wish.

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EXHIBIT "C"

STATE OF ILLINOIS
DEPARTMENT OF PUBLIC AID

To: Recipients of AFDC, AABD, MANG, GA or AMI, or Foster Care

Re: Abortion Services Date: May —, 1979

ILLINOIS DEPARTMENT OF PUBLIC AID MUST PAY FOR MEDICALLY NECESSARY ABORTIONS

Federal Court has ruled that the Illinois Department of Public Aid must pay for all abortions for pregnant women eligible for one of its medical assistance programs (Medicaid, General Assistance Medical, Aid to the Medically Indigent), if the abortion is "medically necessary" and performed prior to "fetal viability." An abortion is deemed to be "medically necessary" for a pregnant woman if the woman's doctor (in his/her professional treatment, exercised in light of all factors relevant to her well-being) deems it to be necessary for the preservation of her life or health. "Fetal viability" is usually placed at about seven months (28 weeks), but may occur earlier, even at 24 weeks.

If an eligible pregnant woman has an abortion after fetal viability, the Department of Public Aid will pay for such an abortion only where:

(a) a doctor has determined that the life of the mother would be endangered if the fetus were carried to term; or

(b) two doctors have determined that severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term.

In addition, the Department of Public Aid will pay for an abortion (or other medical procedure) when it is necessary for a victim of rape or incest, when the rape or incest has been reported promptly to a law enforcement agency or public health service. (A pregnant woman under 18 is considered to have been the victim of rape, even if she was not forced to have sexual relations.) Note that under Illinois law, the required report must be made within 60 days of the incident and must show the name and address of the victim and the date of the incident. It must show the name, address and signature of the person making the report and the date of the report.

Because of the federal court ruling noted above, and previous federal court rulings, doctors, hospitals and clinics are now able to get paid for medical services for the types of abortions described above. Therefore, medical identification (green) cards can be presented for such abortion services, as any other types of medical services.

As may previously have been sent one or more other notices which said that the Department of Public Aid would *not* pay for most of the abortions described above. Please disregard such notices. They are no longer in effect.

Arthur F. Quern, Director
Illinois Department of Public Aid

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 78-1669, 78-1709, 78-1787,
78-1890, 78-1891, 78-2029

DAVID ZBARAZ, ET AL., PLAINTIFFS-APPELLEES

v.

ARTHUR F. QUERN, DEFENDANT-APPELLANT

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 77 C 4522—Alfred Y. Kirkland, *Judge*

ARGUED NOVEMBER 1, 1978—

DECIDED FEBRUARY 13, 1979

Before CUMMINGS, SPRECHER, and BAUER, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This class action was brought under the Civil Rights Act (42 U.S.C. § 1983) to enjoin enforcement of the 1977 Illinois statute

withdrawing medical assistance funding in Illinois for all abortions except those "necessary for the preservation of the life of the [pregnant] woman." [1] Plaintiffs do no object to the refusal to fund purely elective abortions and challenge the limitation on funding only as to medically necessary abortions. They assert that the Illinois statute denies them and the classes they represent [2] rights guaranteed by Title XIX of the Social Security Act (Medicaid) (42 U.S.C. § 1396 *et seq.*) and by the Fourteenth Amendment to the United States Constitution.

Plaintiffs are two doctors whose practice includes the performance for indigent women of medically necessary abortions, most of which are not necessary for the preservation of their lives; the Chicago Welfare Rights Organization, whose members include women dependent on Illinois medical assistance benefits; and Jane Doe, an indigent woman requiring a medically necessary abortion but one that is not necessary to save her life. The principal defendant is Arthur F. Quern, Director of the Illinois Depart-

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[1] Ill. Rev. Stat. Supp. (1977) ch. 23 §§ 5-5, 6-1, 7-1.

[2] The classes certified by the district court consist of (1) all pregnant women eligible for the Illinois medical assistance programs for whom an abortion is medically necessary but not necessary for the preservation of their lives and who wish such abortion performed, and (2) all Illinois physicians who are certified to obtain reimbursement for necessary medical services rendered to, and who perform medically necessary abortions for, persons eligible for the Illinois medical assistance programs. Because of the injunction granted below, the state resumed its prior medical assistance funding for medically necessary abortions.

ment of Public Aid, the state agency charged with administering the medical assistance programs and with enforcement of the statute in question. Two other doctors were allowed to intervene as defendants in the court below.

In December 1977 the district court issued an order abstaining from consideration of the case. Plaintiffs appealed and this Court granted them an injunction pending appeal against enforcement of the Illinois statute insofar as it prohibits state funding for therapeutic abortions.[3]

In March 1978 we reversed the district court's abstention order but did not resolve the merits of plaintiffs' motion for a preliminary injunction. *Zbaraz* v. *Quern*, 572 F.2d 582. Thereafter, the district court held that Title XIX of the Social Security Act and the regulations thereunder require Illinois to provide medical assistance funding for all therapeutic abortions. Judge Kirkland concluded that the Hyde Amendment on which defendants rely does not call for a contrary result.[4] Because the district court resolved the case on statutory grounds, plaintiffs con-

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[3] Our injunction order defined "therapeutic" as "medically necessary or medically indicated according to the professional medical judgment of a licensed physician in Illinois, exercised in light of all factors affecting a woman's health." The district court employed this definition in its final judgment now here on appeal.

[4] The Hyde Amendment (quoted *infra*) was first enacted as a rider to the FY 1977 Health, Education and Welfare appropriations bill. (Section 209 of Pub. L. 95-205; 91 Stat. 1460 Dec. 9, 1977).

stitutional challenges were not resolved. The district court permanently enjoined defendants from denying payments under the Illinois medical assistance programs to the plaintiff physicians "and any other recognized and legal medical providers, for the rendition of medical services to indigent pregnant women for therapeutic abortions * * *." This injunction is still in effect.

This opinion starts with a caveat. This panel is interpreting Congressional and Illinois General Assembly laws as they are written. Our line of duty is to construe those laws, neither to condone nor criticize them. Moreover, we do not start with a clean slate, for six years ago the Supreme Court under the Due Process clause of the Fourteenth Amendment invalidated penal laws that restrict legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother." *Roe* v. *Wade*, 410 U.S. 113, 164. Very recently the Supreme Court reaffirmed that the right to secure an abortion in the early stages of pregnancy is a fundamental right. It also stressed that the abortion decision is primarily a medical one and emphasized the central role of the physician in helping to reach that decision. *Colautti* v. *Franklin*, —— U.S .—— 47 LW 4094. With those admonitions in mind, our task is readily charted.

The Court of Appeals for the First Circuit has recently ruled on a challenge to the Massachusetts abortion funding law that is nearly identical to the challenge mounted here to the similar Illinois law. *Pre-*

term, Inc. v. *Dukakis*, —— F.2d —— (1st Circuit, Nos. 78-1324, 78-1325, and 78-1326, decided January 15, 1979). We agree with Judge Coffin's majority opinion in that case.[5]

The First Circuit held in *Preterm* that Title XIX of the Social Security Act does not require funding of all medical care which is deemed "necessary" by the treating physician, but that it does prohibit a state from singling out medically necessary abortions as a category of care which would be funded only under certain narrow circumstances. The *Preterm* court concluded that for a state so to discriminate in the care it provided would conflict with the statutory provision that state-established standards for determining the extent of medical assistance should be "reasonable" and "consistent with the objectives" of the Medicaid Act. 42 U.S.C. § 1396a(a)(17). These

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[5] Two other courts have also recently handed down opinions in similar cases. In *Roe* v. *Casey* (E.D. Pa., decided December 21, 1978, 47 L.W. 2461) the district court held that a state could not exclude medically necessary abortions as a category of care funded under Medicaid. It is not clear from the abbreviated report whether the court intended that the state pay for abortions which are medically necessary but not funded under the Hyde Amendment.

In *Frieman* v. *Walsh* (W.D. Mo. No. 77-4171-CV-C, decided January 26, 1979), the court similarly held that a state could not discriminate against funding medically necessary abortions under Medicaid. It did not reach the question whether the Hyde Amendment modified Title XIX, but held that even viewed as an appropriations measure, it relieved the states of the obligation of funding non-Hyde Amendment abortions because under Title XIX the states are obligated only to fund those procedures for which they will be reimbursed by the federal government.

objectives include furnishing medical assistance "to meet the costs of necessary medical services." 42 U.S.C. § 1396. In addition, the regulations promulgated pursuant to Title XIX provide that "the State may not arbitrarily deny or reduce the amount, duration, or scope of, such services to an otherwise eligible individual solely because of the diagnosis, type of illness or condition." 45 C.F.R. § 449.10(a)(5)(i).

We agree with the conclusion of the court in *Preterm* that limiting Medicaid assistance to life-threatening abortions "violate[s] the purposes of the Act and discriminate[s] in a proscribed fashion" (slip op. 9).[6] See also *White* v. *Beal*, 555 F.2d 1146 (3d Cir. 1977); *Rush* v. *Parham*, 440 F.Supp. 383, 390-391 (N.D. Ga. 1977). The First Circuit was unanimous that the Medicaid Act requires participating states to provide "medically necessary" abortions under their plans. Judge Bownes' point of disagreement with the majority was that in his view the Hyde Amendment does not permit participating states to limit necessary medical services for abortion to those set forth in that amendment. However, we agree with the conclusion of the majority in *Preterm* that the Hyde Amendment alters Title XIX in such a

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[6] The Massachusetts law at issue in *Preterm* limited funding to abortions "necessary to prevent the death of the mother" and to procedures "necessary for the proper treatment of the victims of forced rape or incest." (Slip op. 2.) That Massachusetts law is similar to but somewhat more liberal than the Illinois statute here at issue, which provides funding mainly when an abortion is "necessary for the preservation of the life of the woman."

way as to allow states to limit funding to the categories of abortions specified in that amendment.

The Hyde Amendment is a provision which has been enacted in varying forms into the appropriations bills funding the Department of Health, Education and Welfare and the Labor Department for fiscal years 1977, 1978 and 1979. The fiscal 1978 and 1979 versions of it provide:

> "None of the funds contained in this Act shall be used to perform abortions except when the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest have been reported promptly to a law enforcement agency or public health service, or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians." (See note 4 *supra.*)

Since, like the First Circuit, we have held that Title XIX prohibits discrimination in funding based on type of condition, the Hyde Amendment by singling out abortions for funding under only certain narrowly defined circumstances is in conflict with the substantive provisions of the Medicaid Act. It therefore becomes necessary to determine whether the Hyde Amendment was intended to amend the provisions of Title XIX or merely to prohibit the expenditure of federal funds. Under the latter interpretation, the states would be obligated to provide for medically

necessary abortions for which federal funds would not be available.[7]

As indicated, we agree with Judge Coffin's opinion in *Preterm* and conclude that the Hyde Amendment did amend Title XIX. We are most reluctant to conclude that Congress has used an appropriations measure to effect such a change in the law, both because this reading enhances the likelihood of confusing and disruptive annual changes in the substantive law and because the Supreme Court has recently disapproved of so interpreting an appropriations bill. *Tennessee Valley Authority* v. *Hill*, —— U.S. ——, 46 LW 4673.

The Hyde Amendment on its face refers only to the use of federal funds. The plaintiffs have asserted that the language of the Hyde Amendment itself appears clear, so that it is—theoretically at least—unnecessary to consult the legislative history. As the preceding discussion indicates, however, what the states are required to do to comply with the requirements of Title XIX is not easily determined. Al-

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[7] The Hyde Amendment clearly mandates abortion funding in two categories of cases not covered by the Illinois law—cases of promptly reported rape or incest, and cases in which severe and long-lasting damage to the mother's physical health would result from continuing the pregnancy. Illinois is required to fund abortions falling into these categories under its Medicaid plan and is entitled to the usual federal reimbursement. The remaining question is whether Illinois must pursuant to Title XIX provide at its own expense abortions which are medically necessary but which do not qualify for federal reimbursement under the Hyde Amendment.

though we have concluded that the states may not exclude from coverage a whole category of medically necessary care, that conclusion is not necessarily obvious from the face of any single provision of the Medicaid Act. Because not all of the obligations of the states are clearly spelled out in that statute and because those obligations arise in the context of a plan for sharing expenses between the federal and state governments,[8] it becomes appropriate to consult the legislative history of the Hyde Amendment to see what impact its provisions were intended to have on the substantive obligations of the participating states.

A fair-minded reading of the lengthy and often highly emotional floor debates in both houses of Congress during the yearly considerations of the Hyde Amendment compels the conclusion that Congress intended through this vehicle to alter the scope of Title XIX in regard to abortions. As the majority opinion in *Preterm* noted, a few Congressmen and Senators said that the amendment would simply restrict federal funds for abortions.[9] In context, however, even these remarks were apparently intended to distinguish between a prohibition on abortions (which would be unconstitutional under *Roe* v. *Wade, supra*), and a mere refusal to fund abortions. They do not appear to have been intended to suggest that state—

[8] 42 U.S.C. § 1396b sets out the basic scheme for partial federal reimbursement of state expenditures under Medicaid.

[9] Some of these comments appear at 123 Cong. Rec. H. 6086, 6090 (June 17, 1977); 123 Cong. Rec. H. 10826-10830 (Oct. 12, 1977); 123 Cong. Rec. S. 11039 (June 29, 1977).

but not federal—funds would be available. Moreover no one, whether supporting or opposing the Hyde Amendment, ever suggested that state funding would be required. To the contrary, the assumption was that when federal funds were withdrawn, the states, although free to continue to pay for abortions not falling within the parameters of the Hyde Amendment, would refuse to do so.[10]

In addition, a frequently reiterated relief was that taxpayers ought not to be compelled by the federal government to finance abortions which were repugnant to them on religious or moral grounds.[11] This concern would apply with at least equal force if the tax expenditures required by federal law came from the state rather than the federal treasury. Nor is there any suggestion in the Congressional debates that the Hyde Amendment would alter the basic scheme of federal-state sharing of Medicaid ex-

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[10] Comments revealing that assumption appear throughout the debates, but a sample of them can be found at 123 Cong. Rec. H. 6085 (Rep. Bauman); *id.* at 6086 (Rep. Stokes); *id.* at 6088 (Rep. Eckhardt); *id.* at 6089 (Reps. Fenwick and Spellman); *id.* at 6092 (Rep. Holtzman); *id.* at 6093 (Reps. Weiss and Allen) (June 17, 1977); 123 Cong. Rec. H. 10968 (Rep. Sears) (Oct. 13, 1977); 123 Cong. Rec. S. 18583-84 (Sen. Bayh); *id.* at 18589 (Sen. Packwood) (Nov. 3, 1977); 123 Cong. Rec. S. 13672 (Sen. Brooke) (Aug. 4, 1977); 123 Cong. Rec. S. 11040 (Sen. McGovern) (June 29, 1977).

[11] Samples of these remarks appear at 123 Cong. Rec. H. 6085 (Rep. Obey); *id.* at 6088 (Rep. Rudd); *id.* at 6089 (Rep. Young) (June 17, 1977); 123 Cong. Rec. H. 10835 (Rep. Early) (Oct. 12, 1977); 123 Cong. Rec. S. 18584-18585 (Sen. Helms) (Nov. 3, 1977).

penses.[12] It is also clear that Congress was aware that its action could be construed as legislation via an appropriations bill,[13] and that this was not the preferred method of procedure.[14]

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[12] Plaintiffs have correctly noted that Medicaid and related statutes sometimes do require state expenditures unmatched by federal funds (Br. at 63-64, note). We have no doubt of Congress' authority to condition its expenditure of Medicaid funds on the states' expenditure of funds for related purposes. However, as plaintiffs' examples indicate, when Congress has imposed such conditions, it has done so explicitly and for the apparent purpose of encouraging the states to undertake programs Congress deemed to be desirable. Not only did Congress not explicitly shift the funding obligation to the states in the Hyde Amendment, but it also clearly did not intend to encourage abortions.

[13] We do not rely on the fact that both the House and the Senate waived their rules against legislating in an appropriations bill (House Rule XXI(2); Standing Rules of the Senate, Rule 16.4) in concluding that the Hyde Amendment worked a substantive change in the law. Apparently both houses of Congress interpret those rules to mean that while a limitation on expenditures would be acceptable, any provision which imposed a duty on federal officials would go beyond a limitation and run afoul of the rules. See 123 Cong. Rec. H. 6082 (June 17, 1977). Because ascertaining when the conditions of the Hyde Amendment would be fulfilled was interpreted to impose additional duties on federal officials, only a flat ban on the use of funds for abortions was construed to be within the rules. It was in order to allow federal funds for abortions in certain limited circumstances that the rules were waived. Since a flat ban on abortion funding, although evidently within the procedural rules, would nevertheless conflict with our interpretation of Title XIX, the fact that the rules were waived, although relied upon by the defendants, is not helpful.

[14] Early in the debate on the fiscal 1978 appropriations, Congressman Hyde spoke as follows:

> "Yesterday, remarks were made that it is unfortunate to burden an appropriation bill with complex issues, such

Finally, the circumstances under which the Hyde Amendment was passed distinguish it from *Tennessee Valley Authority* v. *Hill*, *supra*. The problems the Supreme Court faced when asked to construe the appropriations for the TVA budget, including the Tellico Dam, as effecting a *pro tanto* repeal of the Endangered Species Act do not exist here. Unlike the situation in the *Hill* case, there is no question here that Congress as a body was well aware of the implications of the Hyde Amendment and agreed to them. More importantly, *Hill* involved the question of when expenditures authorized under one Act

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as busing, abortion and the like. I certainly agree that it is very unfortunate. The problem is that there is no other vehicle that reaches this floor in which these complex issues can be involved. Constitutional amendments which prohibit abortions stay languishing in subcommittee, much less committee, and so the only vehicle where the Members may work their will, unfortunately, is an appropriation bill. I regret that. I certainly would like to prevent, if I could legally, anybody having an abortion, a rich woman, a middle-class woman, or a poor woman. Unfortunately, the only vehicle available is the HEW medicaid bill. A life is a life. The life a little ghetto kid is just as important as the life of a rich person. And so we proceed in this bill."

123 Cong. Rec. H. 6083 (June 17, 1977). Consequently, numerous other Congressmen and Senators, both opponents and proponents of the bill, indicated awareness that the amendment would have a substantive impact. See *e.g.*, 123 Cong. Rec. H. 6088 (Rep. Eckhardt); *id.* at 6090 (Rep. Mazzoli); *id.* at 6097 (Rep. Meyner) (June 17, 1977); 123 Cong. Rec. S. 11035 (Sen. Brooke) (June 29, 1977); 123 Cong. Rec. S. 19440, 19441 (Sen. Magnuson); *id.* at 19443 (Sen. Javits); *id.* at 19445 (Sen. Stennis) (Dec. 7, 1977).

should be interpreted to repeal the substantive provisions of an entirely independent Act.[15] Here, in contrast, not only was the appropriations measure geared specifically to the substantive provisions of the affected Act, but the amendment was in the form of limiting previously authorized expenditures rather than authorizing arguably prohibited expenditures, as in *Hill.*

Under these circumstances, mindful that "[t]he doctrine disfavoring repeals * * * applies with even *greater* force when the claimed repeal rests solely upon an appropriations act," [16] we are nonetheless convinced by the overwhelming weight of the legislative history that Congress did intend to alter the substantive requirements of Title XIX by passing the Hyde Amendment.[17] Therefore Illinois is not re-

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[15] As the Supreme Court noted, implying such a repeal could wreak havoc with the legislative process.

> "When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure."

Tennessee Valley Authority v. *Hill,* —— U.S. at ——, 46 LW at 4683.

[16] *Tennessee Valley Authority* v. *Hill,* —— U.S. at ——, 46 LW at 4683.

[17] It is established that Congress has the power to legislate substantively in an appropriations Act. *United States* v. *Dickerson,* 310 U.S. 554. Moreover, when as here the sub-

quired by Title XIX to fund abortions other than those covered by the Hyde Amendment.

As noted, the district court did not reach the constitutional arguments raised by the parties because it had statutory grounds for its decision. Because the constitutional issues were not considered below, and in light of the fact that our interpretation of the Hyde Amendment to modify the requirements of Title XIX may alter the constitutional considerations, it would be inappropriate for us to pass on them now. The parties should have a full opportunity to develop their positions and the district court to rule on them. *Singleton* v. *Wulff*, 428 U.S. 106, 120. Therefore, we remand the case for expedited consideration of the constitutional questions that remain open. This consideration should include, *inter alia*, whether the Hyde Amendment, by limiting funding for abortions to certain circumstances [18] even if such abortions are

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stantive change is a prohibition against the use of funds for previously authorized purposes, the courts have been less hostile to modifications via appropriations bills. *Eisenberg* v. *Corning*, 179 F.2d 275, 276 (D.C. Cir. 1949); *Friends of the Earth* v. *Armstrong*, 485 F.2d 1, 9 (10th Cir. 1973), certiorari denied, 414 U.S. 1171; *City of Los Angeles* v. *Adams*, 556 F.2d 40, 48-49 (D.C. Cir. 1977).

[18] The constraints imposed by the Hyde Amendment on medically necessary abortions which are not imposed on other kinds of medically necessary care include (1) a greater degree of potential harm from withholding treatment (the threatened damage in the case of an abortion must be "severe and long-lasting"), (2) the threatened harm must be physical, and (3) two doctors must make the determination of likely harm.

medically necessary, violates the Fifth Amendment in view of the facts that no other category of medically necessary care is subject to such constraints and that abortion has been recognized as a fundamental right. *Roe* v. *Wade, supra.*

On remand, the permanent injunction granted by the district court must be modified forthwith to require defendants to grant payments to plaintiff physicians and other recognized and legal medical providers for the rendition of medical services to indigent pregnant women for those abortions fundable under the Hyde Amendment. The defendants have pointed out that the challenged Illinois law applies to medical care under fully state-funded plans as well as under Medicaid (Ill. Rev. Stat. ch. 23 §§ 6-1 and 7-1; General Assistance and Local Aid to the Medically Indigent, respectively). Therefore, they assert, since the Illinois statute has so far been determined only to contravene Title XIX as altered by the Hyde Amendment, enforcement of the Illinois statute should not be enjoined as it applies to purely state-funded plans. The plaintiffs urge us to find the statute nonseverable, so that its application to purely state-funded plans falls with the federally funded portion.[19]

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[19] The defendants suggest that we should not consider the severability issue since the district court did not articulate this ground for its decision. However, we may affirm a district court's ruling which is correct as a matter of law even though the proper ground was not expressed. Therefore cases cited by defendants to the effect that an appellate court will not consider a ground for reversal which was not presented to the district court are inapposite.

This presents a close question that necessitates interpreting what the Illinois General Assembly would likely have done had it been able to foresee the development of this case.[20] In a similar situation the Illinois Supreme Court has held a law non-severable (*Sperling* v. *County Officers Electoral Board*, 57 Ill. 2d 81 (1974)), whereas in others it has not (*Vissering Mercantile Co.* v. *Annunzio*, 1 Ill. 2d 108 (1953); *People* ex rel. *Engle* v. *Kerner*, 32 Ill. 2d 212 (1965)). We have been told that the vast majority of publicly funded abortions would come under the Medicaid plan rather than the purely state plans. In these circumstances, it is not at all clear that the General Assembly would have imposed standards for funding from state plans which differ from the standards for Medicaid funding. The defendant State's official has informed us that the Illinois law "represents Illinois' understanding of Congressional purpose as reflected in the Hyde Amendments to federal welfare appropriations and the Supreme Court's delineation of the nature and extent of the qualified 'right' to abortion vis-a-vis the public funding issue * * *" (Br. 9).[21] Since the State itself has tied the challenged statute to the proper interpretation of

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[20] The Illinois Supreme Court has formulated the test for severability of provisions of a law as whether "it can be said that the General Assembly would not have passed the statute with the invalid portion eliminated." *People* ex rel. *Engle* v. *Kerner*, 32 Ill. 2d 212, 221-222 (1965).

[21] When the Illinois law was passed, the version of the Hyde Amendment then in effect (fiscal year 1977) provided funds for abortions only when the life of the mother was endangered.

what is required by Title XIX, evidently it intended that recipients of purely state funds be treated consistently with those who receive Medicaid funds.

In light of this history of the challenged law, and in view of the fact that the resolution of the constitutional issues will apply equally to the state-funded and the Medicaid-funded plans,[22] we conclude that the various provisions of the law should not be severed and that the modified injunction should apply to all publicly funded abortions.

Vacated and remanded for further proceedings consistent herewith.[23]

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[22] If the Hyde Amendment is determined to violate the guarantee of equal protection as it inheres in the Due Process clause of the Fifth Amendment, it appears likely that similar state action would violate the Fourteenth Amendment.

[23] Our mandate shall issue this day.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 77 C 4522

DAVID ZBARAZ, M.D., MARTIN MOTEW, M.D., on their own behalf and on behalf of all others similarly situated; CHICAGO WELFARE RIGHTS ORGANIZATION, an Illinois not-for-profit corporation; and JANE DOE, on her own behalf and on behalf of all others similarly situated, PLAINTIFFS

v.

ARTHUR F. QUERN; Director of the Illinois Department of Public Aid, DEFENDANT

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the following motions: (1) defendant's Motion to Dismiss the Complaint for Want of Jurisdiction; (2) a Motion to Intervene presented by Jasper F. Williams, M.D. and Eugene F. Diamond, M.D.; (3) plaintiffs' Motions to Proceed as a Class; (4) the parties' cross-motions for summary judgment on injunctive claims and on the merits; and (5) the parties' motions regarding the notice requirements in this case.

The Complaint seeks an injunction against the enforcement of Illinois P.A. 80-1091 (the "Act") which places restrictions upon Illinois medical assistance

funding for certain types of abortions.* Jurisdiction of the Court is invoked pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343. The Court considers the parties' motions in order.

I. *Defendant's Motion to Dismiss for Want of Jurisdiction*

Defendant first moves to dismiss this action for want of jurisdiction. Defendant argues that plaintiffs lack standing to bring suit because they have no stake in the outcome of this litigation. This Court does not agree.

On April 25, 1978, this Court granted plaintiff's leave to add a party plaintiff to this suit: a pregnant medical assistance recipient who has been unable to obtain an abortion because many clinics are currently turning away such recipients until the scope of the Act has been determined. The recipient further states that those clinics which are currently performing abortions are unable to assist her because of the demand created by the shortage of available clinics.

A plaintiff has standing to sue if plaintiff can demonstrate: (1) that he has a concrete, adversary stake in the outcome of the litigation so that he will suffer an "injury in fact" if the statute in question is enforced; and (2) that he is asserting his own legal rights. *Warth* v. *Seldin*, 422 U.S. 490 (1975); *Wynn* v. *Scott*, No. 75 C 3975 (N.D. Ill. April 12, 1978) (three-judge court).

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* The full text of the Act is attached to this Opinion as Appendix A.

In this action, both a pregnant medical assistance recipient unable to obtain an abortion and a physician regularly performing abortions for such individuals have standing to challenge a law which is alleged to limit funding of abortions in an unclear manner. *Singleton* v. *Wulff*, 428 U.S. 106 (1976).

Although the Act has not yet been enforced, plaintiffs here allege that they are potential recipients of or providers of abortion services which would be funded by the state but for the enactment of the Act. The threatened financial impact of the Act is reasonably direct and certain. *See Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). Plaintiffs clearly have standing to bring this suit.

Accordingly, defendant's Motion to Dismiss for Want of Jurisdiction is denied.

II. *Motion to Intervene*

This Court is next asked to decide whether two doctors may intervene to represent the interests of five "classes" of individuals.

Applicants seek to intervene pursuant to Rule 24 (a) (2), Federal Rules of Civil Procedure. An application for non-statutory intervention as of right must feet four requirements. The applicants must: (1) file a timely application; (2) have an interest in the subject matter of the action; (3) demonstrate that the protection of their interests may be impaired by disposition of the action; and (4) show that their interests are not adequately represented by an existing party. 3B Moore's Federal Practice ¶ 24.09-[1] at

24-285 (2nd ed. 1977). This Court finds that applicants for intervention have met each of these requirements.

Applicants filed a timely application for intervention. Applicants filed their petition for intervention on December 12, 1977, six days after the original filing of the Complaint. The filing of the petition preceded defendants' response to the Complaint and all other proceedings. This Court finds that the application for intervention was timely.

Applicants have demonstrated that they have an interest in the subject matter of this action. First, applicants have standing to sue, *except* insofar as they seek to represent the interests of unborn children, *Planned Parenthood* v. *Danforth*, 482 U.S. 52 (1976). Applicants' standing alone is a sufficient basis for a finding that applicants have an "interest" in the action, *Rosado* v. *Wyman*, 397 U.S. 397 (1970).

Applicants have also demonstrated that protection of their interests may be impaired by disposition of this suit. In applicants' absence this Court may render a decision which will impair their economic and other interests by allowing funding of more types of abortions than the Act presently permits.

Finally, applicants have shown that their interests may not be adequately represented by existing parties. Applicants here have demonstrated that defendant has in the past opposed enactment of the statute he is now called upon to uphold. Under these circumstances, applicants have met their burden of demonstrating that representation "may be" inadequate,

Trobovich v. *United Mine Workers*, 404 U.S. 528 n. 10 (1972).

Accordingly, applicants Jasper Williams, M.D. and Eugene Diamond, M.D. may intervene in this action. This Court will consider their briefs in deciding the remaining issues in this case.

III. *Plaintiffs' Motions to Proceed as a Class*

Plaintiffs next move for certification of two plaintiff classes consisting of:

> All registered and licensed physicians in Illinois who are certified to obtain reimbursement for necessary medical services rendered to, and who perform medically necessary abortions for, persons eligible for medical services under the Illinois Medicaid, state funded General Assistance and Aid to the Medically Indigent Programs, Ill. Rev. Stat. ch. 23 Art. V-VIII (the "Illinois medical assistance programs").

and

> All pregnant women eligible for the Illinois Medical Assistance Programs [Ill. Rev. Stat. ch. 23 Art. V-VIII] for whom an abortion is medically necessary, but not necessary for the preservation of their lives, and who wish such abortions performed.

Defendant opposes certification of these classes on the following grounds: (1) that class definitions do not include a statement that members of the class have suffered injury as a result of the Act and that even if the definition were amended to include language about injury, the class representatives could not

allege that they had been so injured; (2) that class definitions are overbroad because they include two state programs which are not totally state funded; and (3) that there is an insufficient showing that the numerosity requirements of Rule 23 have been satisfied. This Court does not agree.

Rule 23, Federal Rules of Civil Procedure establishes the prerequisites to the maintenance of a class action. Under Rule 23(b)(2), a class action is appropriate when "the party opposing the class has acted or refused to act on grounds generally applicable to the class" and the representative is seeking "final injunctive relief or corresponding declaratory relief."

For an action to proceed under Rule 23(b)(2), however, the requirements of Rule 23(a) must also be satisfied. Rule 23(a) requires the putative class to: (1) be "so numerous that joinder of all members is impracticable"; (2) present "questions of law or fact common to the class"; (3) have claims of the representative parties that "are typical of the claims . . . of the class"; and (4) have representative parties who "will fairly and adequately protect the interests of the class." Plaintiffs have the burden of proving that a case is appropriately a class action and meets all the requirements of Rule 23, *Valentino* v. *Howlett*, 528 F.2d 975 (7th Cir. 1976).

A. *Numerosity*

Plaintiffs have adequately shown that the classes are "so numerous that joinder of all members is impractical", Rule 23(a)(1). The affidavits of Drs.

Martin Motew, David Zbaraz, Philip Rosenow and Louis Keith show that at six hospitals in Chicago, over 51 physicians perform therapeutic abortions for indigent women eligible for medical assistance program benefits whose abortions are not necessary to preserve their lives. Plaintiffs have also submitted statistical summaries from which it may be inferred that the number of physicians throughout Illinois far exceeds 51.

Further, plaintiffs have demonstrated that during fiscal 1977, over 24,000 abortions were performed for pregnant women eligible for aid under Illinois medical assistance programs and that thousands of such abortions were therapeutic abortions not necessary to preserve the woman's life.

Under these circumstances, this Court finds that both plaintiff classes satisfy the numerosity requirements of Rule 23. *See Robertson* v. *National Basketball Association*, 389 F.Supp. 867 (S.D. N.Y. 1975).

B. *Common Questions of Law or Fact*

Rule 23(a)(2) requires that there be a question of law or fact common to the class, *Pollion* v. *Power*, 47 F.R.D. 331 (N.D. Ill. 1969). All class members here challenge the Act insofar as it denies coverage for certain therapeutic abortions on the grounds that it violates Title XIX of the Social Security Act, 42 U.S.C. § 1396a et seq. and the Ninth and Fourteenth Amendments. These questions predominate the litigation and are sufficient to meet the requirement that there be common questions of law or fact.

C. *Typicality*

Rule 23(a)(3) requires that the claims of representative plaintiffs be typical of the claims of the class. This requirement has been interpreted to mean that there must be no express conflict between representative parties over litigation issues, *Mersay* v. *First Republic Corporation of America*, 43 F.R.D. 465 (S.D. N.Y. 1968). In this action, the claims of named plaintiffs and the class are the same: challenges to the termination of reimbursement for certain types of therapeutic abortions. Plaintiffs have satisfied the requirements of Rule 23(a)(3).

D. *Adequacy of Representation*

Rule 23(a)(4) requires that class representatives fairly and adequately represent the interests of the class. This requirement has been interpreted to mean that class representatives must have an interest in the outcome of the litigation and be represented by attorneys who are qualified and able to conduct the litigation, *Shulman* v. *Ritzenbert*, 47 F.R.D. 202 (D. D.C. 1960). The representative physicians here have both pecuniary and professional interests in providing medical services which may no longer be funded under the Act. The representative pregnant woman has an interest in obtaining an abortion but would be financially unable to obtain one if the Act remains in effect. Further, plaintiffs' attorneys have documented their extensive experience in the area of class litigation.

This Court finds that plaintiffs have satisfied the requirements of Rule 23(a)(4).

This Court further finds that plaintiffs have adequately shown that defendant has failed to act on grounds generally applicable to the class, making final injunctive relief or corresponding declaratory relief appropriate, Rule 23(b)(2), Federal Rules of Civil Procedure.

Accordingly, plaintiffs' Motions to Proceed as a Class are granted. This Court hereby certifies the classes as hereinabove described.

IV. *The Parties' Cross-Motions For Summary Judgment*

The parties now move for summary judgment in their favor on the issue of the validity of the Act. The Court considers the statutory issues first.

A. *The Act and Title XIX of the Social Security Act*

Plaintiffs first argue that Illinois' failure to cover "medically necessary" abortions under the Illinois medical assistance programs violates the Social Security Act and implementing regulations. This Court agrees.

The Illinois medical assistance programs are designed to "furnish medical assistance to meet the costs of necessary medical services," 42 U.S.C. § 1396a. Eligible recipients are the "categorically needy" who are recipients of cash welfare benefits and may include the "medically needy" whose medical expenses exceed their available income. Persons eli-

gible for aid must be covered for the following categories of services: the "categorically needy" must be provided funds for: (1) inpatient hospital services, (2) outpatient hospital services, (3) other laboratory and x-ray services, and (4) physicians' services, whether in the office, patient's home, hospital or elsewhere, and the "medically needy" must be covered for at least the first five services listed in 42 U.S.C. § 1396d(a). Illinois provides all categories of care specified in Title XIX.

Once a state has opted to participate in the program, Title XIX requires that the state establish "reasonable standards" for determining the extent to which assistance will be given "consistent with the objectives of [the program]." Federal regulations further provide that the state may limit services "based on such criteria as medical necessity," 42 C.F.R. § 449.10(a)(5)(i) [45 C.F.R. § 249.10(a)(5)(i)].

Illinois may not arbitrarily deny or reduce the amount, duration or scope of services to an otherwise eligible individual solely because of the diagnosis or type of condition, 42 C.F.R. § 449.10(a)(5)(i), [45 C.F.R. § 249.10(a)(5)(i)]. *See also White* v. *Beal*, 413 F.Supp. 1141 (E.D. Pa. 1976).

It is undisputed that the Act authorizes reimbursement to physicians who perform abortions to "preserve" the life of the woman or who induce miscarriages or premature births to "preserve" the life of the mother or her unborn child. It is also clear that Illinois may permissibly withhold reimbursement to physicians who perform abortions for non-medical

reasons alone (non-therapeutic abortions), *Beal* v. *Doe*, 97 S.Ct. 2366 (1977); *Maher* v. *Doe*, 97 S.Ct. 2391 (1977), and that Illinois does so withhold reimbursement.

At issue here is whether an abortion "necessary for the preservation of the life" of the mother is co-extensive with a "medically necessary" abortion as mandated by Title XIX of the Social Security Act. Plaintiffs' briefs, affidavits and exhibits provide examples of the circumstances under which a physician might perform a therapeutic abortion deemed "medically necessary" but not clearly "life preserving." This Court finds that under the Act it is unlikely that the state would reimburse physicians performing abortions for indigent women whose lives could be shortened or threatened rather than terminated by carrying the fetus to term.

This Court notes that plaintiffs have shown that a pregnant woman's life could be threatened if she were diabetic, suffering from heart disease, hypertension, or sickle cell anemia and was not motivated to continue her pregnancy. (See Depp Affidavit at 6).

Since the medical assistance program is designed to provide *necessary* medical services for the needy, this Court holds that Illinois must provide funds for all therapeutic abortions. Plaintiffs have adequately shown that necessary medical services are *more* than services to save a life in peril. Defendant may not pick and choose among medically necessary treatments for medical assistance recipients, but must pro-

vide funds for treatment when, in the discretion of the attending physician, such treatment is medically indicated. The definition of medical necessity may not differ when the condition treated is pregnancy. *See Beal* v. *Doe, supra.*

This Court recognizes the problems presented by allowing the physician to define medical necessity. The problems are highlighted by plaintiffs' own argument that it is medically safer to have an abortion in the first and most of the second trimester than to continue the pregnancy. Such an argument could convert all first trimester and most second trimester abortions to medically necessary (therapeutic) abortions. The attending physician has a great deal of discretion, but that discretion is not unfettered. The state may not unduly interfere with the physicians' determinations but neither may it ignore the basis upon which the decision is made.

B. *The Hyde Amendment*

Congress' enactment of the new Hyde Amendment (Section 209 of Pub. L. 95-205) would not change the result here reached. That amendment to the Departments of Labor and Health, Education and Welfare Appropriations Act for 1978 provides that:

> None of the funds contained in this Act shall be used to perform abortions except when the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of

> rape or incest, when such rape or incest have been reported promptly to a law enforcement agency or public health service, or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

Limitations on the use of funds in an appropriations bill will not suspend statutory obligations. *See New York Airways, Inc.* v. *United States*, 369 F.2d 743 (Ct. of Claims 1966).

This Court finds that the new Hyde Amendment does not affect the result reached in Part A, *supra*.

C. *The Act and the Constitution*

This Court's resolution of the issues on statutory grounds makes consideration of plaintiffs' constitutional challenges unnecessary.

D. *Summary*

Accordingly, this Court holds that plaintiffs are entitled to summary judgment on their claims that the Act violates Title XIX of the Social Security Act. This Court hereby orders that defendants be permanently enjoined from:

> (1) enforcing Illinois P.A. 80-1091 to deny payments under the Illinois medical assistance programs to plaintiffs Zbaraz, Motew, and any other recognized and legal medical providers, for the rendition of medical services to indigent pregnant women for therapeutic abortions, or to

deny such payments on behalf of any such indigent pregnant women for such abortions;

(2) directing notice to any recognized and legal medical providers, or to persons receiving assistance under the Illinois medical assistance programs, that therapeutic abortions are not, or will not be, a covered (reimbursable) service under the Illinois medical assistance programs.

As used herein:

(a) "recognized and legal medical providers" means all persons or institutions in Illinois who are certified to obtain reimbursement for medical services;

(b) The "Illinois medical assistance programs" means the Medicaid, state-funded General Assistance, and Aid to the Medically Indigent programs, established pursuant to Ill. Rev. Stat., ch. 23, Arts. V-VIII;

(c) "Indigent pregnant women" means pregnant women eligible for assistance under the Illinois medical assistance programs;

(d) "Therapeuctic" means medically necessary or medically indicated according to the professional medical judgment of a licensed physician in Illinois, exercised in light of all factors affecting a woman's health.

Defendant's Motion for Summary Judgment is denied.

V. *NOTICE REQUIREMENTS*

This Court's resolution of prior motions makes consideration of the parties' arguments regarding notice requirements unnecessary.

VI. *CONCLUSION*

Defendant's Motion to Dismiss for Want of Jurisdiction is denied.

The Motion to Intervene by Jasper F. Williams, M.D. and Eugene F. Diamond, M.D. is granted.

Plaintiffs' Motions to Proceed as a Class are granted as above described.

Plaintiffs' Motion for Summary Judgment is granted and a permanent injunction is entered as described above.

Defendant's Motion for Summary Judgment is denied.

This Court's resolution of prior motions makes consideration of the parties' arguments regarding notice requirements unnecessary.

ENTER: /s/ Alfred Y. Kirkland
ALFERD Y. KIRKLAND
Judge

DATED: MAY 15, 1978

APPENDIX A

AN ACT to amend Sections 5-5, 6-1 and 7-1 of "The Illinois Public Aid Code", approved April 11, 1967, as amended.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Sections 5-5, 6-1 and 7-1 of "The Illinois Public Aid Code", approved April 11, 1967, as amended, are amended, the amended Sections to read as follows:

(Ch. 23, par. 5-5)

Sec. 5-5. Medical services.) The Illinois Department, by rule, shall determine the quantity and quality of the medical assistance for which payment will be authorized, and the medical services to be provided, which may include all or part of the following: (1) inpatient hospital services; (2) outpatient hospital services; (3) other laboratory and x-ray services; (4) skilled nursing home services; (5) physicians' services whether furnished in the office, the patient's home, a hospital, a skilled nursing home, or elsewhere; (6) medical care, or any other type of remedial care furnished by licensed practitioners; (7) home health care services; (8) private duty nursing service; (9) clinic services; (10) dental services; (11) physical therapy and related services; (12) prescribed drugs, dentures, and prosthetic devices; and eyeglasses prescribed by a physician skilled in the diseases of the eye, or by an optometrist, which-

ever the person may select; (13) other diagnostic, screening, preventive, and rehabilitative services; (14) transportation and such other expenses as may be necessary; (15) any other medical care, and any other type of remedial care recognized under the laws of this State, *but not including abortions, or induced miscarriages or premature births, unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.* The preceding terms include nursing care and nursing home services for persons who rely on treatment by spiritual means alone through prayer for healing.

The Illinois Department, by rule, may distinguish and classify the medical services to be provided in accordance with the classes of persons designated in Section 5-2.

The Illinois Department shall establish such regulations governing the dispensing of health services under this Article as it shall deem appropriate. In formulating these regulations the Illinois Department shall consult with and give substantial weight to the recommendations offered by the Legislative Advisory Committee. The Department should seek the advice of formal professional advisory committees appointed by the Director of the Illinois Department for the purpose of providing regular advice on policy

and administrative matters to the Illinois Department.

All dispensers of medical services shall be required to maintain and retain business and professional records sufficient to fully and accurately document the nature, scope, details and receipt of the health care provided to persons eligible for medical assistance under this Code, in accordance with regulations promulgated by the Illinois Department. The rules and regulations shall require that proof of the receipt of prescription drugs, dentures, prosthetic devices and eyeglasses by eligible persons under this Section accompany each claim for reimbursement submitted by the dispenser of such medical services. No such claims for reimbursement shall be approved for payment by the Illinois Department without such proof of receipt.

The rules and regulations of the Illinois Department shall require that a written statement including the required opinion of a physician shall accompany any claim for reimbursement for abortions, or induced miscarriages or premature births. This statement shall indicate what procedures were used in providing such medical services.

The Illinois Department shall require that all dispensers of medical services desiring to participate in the Medical Assistance program established under this Article to disclose all financial, beneficial, ownership, equity, surety or other interests in any and all firms, corporations, partnerships, associations, business enterprises, joint ventures, agencies, institutions

or other legal entities providing any form of health care services in this State under this article.

The Illinois Department shall develop and operate, in cooperation with other State Departments and agencies and in compliance with applicable federal laws and regulations, appropriate and effective systems of health care evaluation and programs for monitoring of utilization of health care services and facilities, as it affects persons eligible for medical assistance under this Code. The Illinois Department shall report regularly the results of the operation of such systems and programs to the Legislative Advisory Committee on Public Aid to enable the Committee to ensure, from time to time, that these programs are effective and meaningful.

(Ch. 23, par. 5-1)

Sec. 6-1. Eligibility requirements.) Financial aid in meeting basic maintenance requirements for a livelihood compatible with health and well-being, plus any necessary treatment, care and supplies required because of illness or disability, shall be given under this Article to or in behalf of persons who meet the eligibility conditions of Sections 6-1.1 through 6-1.6. *Nothing in this Article shall be construed to permit the granting of financial aid where the purpose of such aid is to obtain an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment or except an induced premature birth intended to produce a live viable child and such proce-*

dure is necessary for the health or the mother or her unborn child.

Until August 1, 1969, children who require care outside their own homes, where no other sources of funds or insufficient funds are available to provide the necessary care, are included among persons eligible for aid under this Article. After July 31, 1969, the Department of Children and Family Services shall have the responsibility of providing child welfare services to such children, as provided in Section 5 of "An Act creating the Department of Children and Family Services, codifying its powers and duties, and repealing certain Acts and Sections herein named", approved June 4, 1963, as amended.

(Ch. 23, par. 7-1)

Sec. 7-1. Eligibility requirements.) Aid in meeting the costs of necessary medical, dental, hospital, boarding or nursing care, or burial shall be given under this Article to or in behalf of any person who meets the eligibility conditions of Sections 7-1.1 through 7-1.3, *except where such aid is for the purpose of obtaining an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.*

APPENDIX E

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 77-2290

DAVID ZBARAZ, M.D., Martin Motew, M.D., on their own behalf and on behalf of all other similarly situated; CHICAGO WELFARE RIGHTS ORGANIZATION, an Illinois not-for-profit Corporation, PLAINTIFFS-APPELLANTS

v.

ARTHUR F. QUERN, Director of the Illinois Department of Public Aid,

DEFENDANT-APPELLEE

Argued Feb. 16, 1978

Decided March 15, 1978

Before SPRECHER, BAUER and WOOD, Circuit Judges.

PER CURIAM.

Appellants brought an action in the District Court for the Northern District of Illinois to enjoin enforcement of Illinois statute P.A. 80-1091, which prohibits public assistance funding of all abortions except those medically necessary for the preservation of the *life* of the pregnant woman. The complaint asserts that P.A. 80-1091 violates Title XIX of the Social Security Act, 42 U.S.C. §§ 1396, *et seq.*, and the equal protec-

tion clause of the Fourteenth Amendment to the degree that it denies funding for abortions which are medically necessary for the preservation of the *health* of the woman seeking treatment, even though her life might not be in danger. The district judge entered an order staying the proceeding based on the abstention doctrine of *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). We reverse and remand to the district court for consideration of appellants' motion for a temporary restraining order and/or preliminary injunction and further proceedings.

I.

Background

On November 17, 1977 the Illinois state legislature enacted P.A. 80-1091 which prohibits

> the granting of public assistance where the purpose of such aid is to obtain an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.

On December 6, 1977 appellants—two doctors whose medical practices include the provision of abortions to indigent women—filed a complaint in the district court pursuant to 42 U.S.C. § 1983 claiming that the

statute deprives them and their patients of their rights under Title XIX of the Social Security Act, 42 U.S.C. §§ 1396, *et seq.*, and the Ninth and Fourteenth Amendments to the United States Constitution. The complaint seeks declaratory and injunctive relief. The statutory claim is based on the argument that although a state has a limited discretion to decide the type and extent of medical assistance to be provided under its Medicaid program, it may not exclude from coverage services which are medically necessary for the patient's health. Appellants thus contend that Title XIX requires the funding of medically necessary abortions even if the woman's life is not in danger. The constitutional claim is predicated on the proposition that Illinois' decision to withdraw funding for abortions necessary for the preservation of the health of the pregnant woman, other than those where her life is in danger, while continuing to fund other types of medical procedures required for "health" rather than "life" reasons, constitutes a violation of the equal protection clause of the Fourteenth Amendment in that the difference in treatment is not based on a sufficient state interest.[1]

Appellants also filed a motion for temporary restraining order and/or preliminary injunction, in opposition to which appellee Quern—the Director of the Illinois Department of Public Aid—filed a memo-

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[1] One of the legal issues disputed by the parties is whether a "rational" state interest or a "compelling" state interest is needed in order to justify the differential treatment.

randum. Before appellee's answer to the complaint was to have been filed, the district court issued an order continuing appellants' motion pending the institution and completion of appropriate proceedings in the Illinois state courts. In abstaining, the court reasoned that the Illinois statute, if broadly construed, could authorize reimbursement for some or all of the "medically necessary" procedures which plaintiffs contend should be reimbursed and that even a narrow interpretation would serve to "define precisely the constitutional question presented. *Bellotti* v. *Baird*, 428 U.S. 132 [, 96 S.Ct. 2857, 49 L.Ed.2d 844] (1976)." Appellants argue that the district court's decision to abstain was in error. This court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291. *Drexler* v. *Southwest DuBois School Corp.*, 504 F.2d 836, 838 (7th Cir. 1974) (en banc); *Vickers* v. *Trainor*, 546 F.2d 739, 741 (7th Cir. 1976).

II.

Abstention

The *Pullman*-type abstention doctrine invoked by the district court is one of the three exceptions to "the virtual unflagging obligation of the federal courts to exercise the jurisdiction given them" recognized by the Supreme Court in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 1246, 47 L.Ed.2d 483 (1976). *Pullman*-type absention is appropriate "where an unconstrued state statute is susceptible of a construc-

tion by the state judiciary which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem." *Bellotti* v. *Baird*, 428 U.S. at 147, 96 S.Ct. at 2866 (internal quotation marks omitted). *Harrison* v. *NAACP*, 360 U.S. 167, 177, 79 S.Ct. 1025, 3 L.Ed.2d 1152 (1959). See also *Colorado River Water Conservation District* v. *United States*, 424 U.S. at 813-14, 96 S.Ct. 1236; *Carey* v. *Sugar*, 425 U.S. 73, 78-79, 96 S.Ct. 1208, 47 L.Ed.2d 587 (1976); *Lake Carriers' Assn.* v. *MacMullan*, 406 U.S. 498, 510, 92 S.Ct. 1749, 32 L.Ed.2d 257 (1971); *Zwickler* v. *Koota*, 389 U.S. 241, 249, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967); *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). The essence of the doctrine is that the federal courts should avoid entering into "a sensitive area of social policy . . . unless no alternative to its adjudication is open." *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U.S. at 498, 61 S.Ct. at 644. "Needless friction with state policies" may thus be avoided. *Id.* at 500, 61 S.Ct. 643. However, the doctrine is limited by considerations of "[t]he delay and expense to which application of the abstention doctrine inevitably gives rise.' " *Lake Carriers' Assn.* v. *MacMullan*, 406 U.S. at 509, 92 S.Ct. at 1757, quoting *England* v. *Medical Examiners*, 375 U.S. 411, 418, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964); *Bellotti* v. *Baird*, 428 U.S. at 150, 96 S.Ct. 2857. The court should thus consider whether there exist "state court proceedings providing an easy and ample means of

clarifying Illinois law." *Vickers* v. *Trainor*, 546 F.2d at 744.

Although it cannot be disputed that the case at bar would require the court to enter into "a sensitive area of social policy," it is unlikely that a state court construction of P.A. 80-1091 will either moot or materially alter the statutory or constitutional questions raised by appellants. It is also questionable whether there exists an "easy and ample" means of obtaining a state court construction of the statute which would minimize the burden that abstention would place on appellants and the indigent women whose rights they are asserting.

Appellant doctors are asserting the rights of indigent women who might require an abortion for the preservation of their health, even if their lives are not in danger. The size of the class of women involved depends on how the terms "medically necessary for the preservation of the woman's health" and "necessary for the preservation of the woman's life" are interpreted. The Illinois statute's "preservation of life" standard is ambiguous, in the sense that it is uncertain exactly what set of medical diagnoses or prognoses is within its intended ambit. There is a similar ambiguity in the "medically necessary for the preservation of health" standard. However, it is clear that the constitutional and statutory claims raised by appellants will not be obviated in their entirety by a state court interpretation of the "preservation of life" standard unless it is found to be at least coextensive with the "preservation of health"

standard. The likelihood of such a construction does not appear sufficiently great to justify abstention.

On the "plain meaning" semantic level there is clearly a distinction between a medical condition which threatens to impair a woman's health and one which threatens her life. Although ill health may be strongly correlated with a shortening of the sufferer's expected life span, in normal linguistic usage the phrase "necessary for the preservation of life" implies a more immediate and more serious threat of death than the phrase "necessary for the preservation of health." This quotidian differentiation has been implicitly recognized in a number of statutes dealing with abortion, including P.A. 80-1091 itself. Although the Illinois statute makes an exception from the ban on the funding of abortions only for abortions "necessary for the preservation of the life of the woman," with respect to induced premature births intended to produce a live viable child, it permits reimbursement of all procedures "necessary for the health of the mother or her unborn child." The distinction can also be found in the successive funding amendments to the annual Departments of Labor and Health, Education and Welfare Appropriations Acts,[2] as well as in a number of now defunct crimi-

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[2] Compare the fiscal 1977 "Hyde Amendment," Pub. L. 94-439, § 209 [90 Stat. 1418]:

> None of the funds contained in this Act shall be used to perform abortions *except when the life of the mother*

nal abortion statutes,[3] and state Medicaid provisions dealing with the funding of abortions.[4]

Appellee Quern's argument that the ambiguity of the "preservation of life" standard of P.A. 80-1091 is broad enough to encompass the "preservation of health" standard rests primarily on his view of the legislative history of the statute. It is true that there are statements in the legislative debates to the purport that the statute only prohibits funding of "voluntary," "nontherapeutic," "medically unnecessary" abortions.[5] However, on our reading of the legisla-

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> *would be endangered* if the fetus were carried to term (emphasis added)

with the comparable section of the fiscal 1978 bill, Pub. L. 95-205, § 101:

> Provided, that none of the funds provided for in this paragraph shall be used to perform abortions *except where the life of the mother would be endangered* if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest have been reported promptly to a law enforcement agency or public health service, *or except in those instances where severe and long-lasting physical health damage to the mother would result* if the pregnancy were carried to term when so determined by two physicians (emphasis added). [91 Stat. 1460]

[3] See e.g., The Uniform Abortion Act reproduced in *Roe* v. *Wade*, 410 U.S. 113, 146, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

[4] See, e.g., the Pennsylvania statute reproduced in *Beal* v. *Doe*, 432 U.S. 438, 97 S.Ct. 2366, 2369 n.3, 53 L.Ed.2d 464 (1977).

[5] More completely, appellee cites the following portions of the legislative history:

A. *Third Reading, Illinois House of HB 333*

REPRESENTATIVE LEINENWEBER

The issue is, 'as a matter of public policy of the State of Illinois . . . to pay for abortions that are not medically necessary.'

* * * *

House Bill 333 seeks to set public policy by drawing a line on payments for nonmedically necessary surgery.

* * * *

House Bill 333 seeks to set public policy that the state ought not to pay for nontherapeutic medically unnecessary abortions. There are millions of Illinois taxpayers who believe deeply that nontherapeutic abortions are morally objectionable. Those feelings are to be recognized in the public policy of this State.

REPRESENTATIVE HUDSON

The Bill seeks to cover the cost of only medically necessary procedures and not elective abortions.

B. *Third Reading, Illinois Senate of HB 333*

SENATOR WASHINGTON

Senator Lemke, would not your bill prevent medical purveyors or doctors from giving adequate treatment to a victim of a rape case or to an incestuous relationship?

SENATOR LEMKE

This bill is in conformity with the Supreme Court rule. It does not abolish therapeutic abortions. If it's up to the physician to decide if it's . . . if this will jeopardize the . . . the woman's life physically or mentally and . . . this will not in any way affect that.

SENATOR WASHINGTON

Then you interpret mental jeopardy the status, mental status of . . . mental attitude of a raped woman or one who has been the victim of an incest, you interpret that language to cover this?

SENATOR LEMKE

Yes.

[Continued]

tive history there is at best an ambiguous silence as to whether the legislators meant that "therapeutic," "medically necessary" abortions might include those necessary for the preservation of the woman's health as well as those necessary for the preservation of her life. This ambiguous legislative history is not apt to convince the Illinois courts to abandon the common sense conclusion that the two standards are different.

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[5] [Continued]

SENATOR LEMKE

If the . . . if the medical personnel at that hospital, or any hospital, determines that this is a . . . that she is in need of a therapeutic abortion, which is a medical determination and is not my determination, she can have it. This will not in . . . in any way reflect on her. Therapeutic abortion can be for physical or mental reasons and I . . . I think that this bill in no way will affect that.

SENATOR LEMKE

* * * This bill does no way affect therapeutic abortions. It . . . it affects voluntary abortions, this is what it affects.

C. *Veto Override Session, November 11, 1977, Illinois House*

REPRESENTATIVE LEINENWEBER

* * * Now, what reasons should guide this state in determining the public policy? First and foremost, I would suggest to you that millions of people in this state and elsewhere strongly feel that nontherapeutic, nonmedically necessary abortions are immoral and wrong.

* * * *

Again, are we being fair to the poor? Well, for . . . first of all, there's no equal protection problem because the state would not provide anybody with a free abortion unless its medically necessary.

We therefore conclude that it is unlikely that a state court construction of P.A. 80-1091 would moot in their entirety the statutory and constitutional claims raised by the appellants.

However, the possibility of a complete mooting of the constitutional question is not a necessary prerequisite to an application of the *Pullman* doctrine. Abstention may also be properly invoked in resolution of the unclear question of state law might cause the constitutional problem to be "presented in a different posture," *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185, 189, 79 S.Ct. 1060, 3 L.Ed.2d 1163 (1959), making it possible "to define precisely the constitutional question presented," *Bellotti* v. *Baird*, 428 U.S. at 148, 96 S.Ct at 2866, or to "materially change the nature of the problem," *Harrison* v. *NAACP*, 360 U.S. at 177, 79 S.Ct. at 1030. Nevertheless, we do not believe that there is a sufficient likelihood that a state court construction of P.A. 80-1091 would materially alter the basic statutory and constitutional questions raised by appellants so as to justify abstention. Concededly, a broad interpretation of the "preservation of life" standard, even one falling short of equating "life" with "health," could substantially reduce the number of women aggrieved by the statute and whose rights appellants could assert. But this would not change the basic constitutional questions raised by appellants. The appellants contend that in the circumstances of this case there is a limit beyond which the state is not free to withhold funding of abortions. The location of that boundary is determined by the concept of "medically

necessary for the preservation of the patient's health" as given content by the provisions of Title XIX and by the range of other medical procedures which Illinois has chosen to fund. The federal courts can determine whether that line exists and, if so, where it is to be drawn, without resolving the uncertainty concerning P.A. 80-1091's "preservation of life" standard. Conversely, a clarifying construction of the Illinois statute which does not completely moot the federal statutory and constitutional questions will merely determine which medical conditions fall outside the permissible boundary once the existence and location of the line is known, but without materially aiding the court in answering the latter questions. Thus, the present case differs from cases such as *Bellotti* v. *Baird*, 428 U.S. 132, 96 S.Ct. 2857, 49 L. Ed2d 844 (1976), where a resolution of an ambiguity of the state statute would have changed the dimensions of the constitutional question presented. There the constitutionality of the abortion consent provisions depended on how burdensome they would be to the pregnant adolescent's exercise of her right of privacy and the statute was susceptible to two interpretations materially different in their degree of burdensomeness.

In addition to questioning whether absention offers any significant benefits in the present case, appellants argue that abstention will impose substantial burdens on themselves and their patients and that there is no "easy and ample" procedure for seeking a judicial clarification of the Illinois statute which would mini-

mize those burdens. In addition to the increased expense of protracted litigation, the indirect costs of delay are of particular importance in this case. Although in the first instance enforcement of P.A. 80-1091 according to its plain meaning will only adversely affect the monetary interests of appellants and other similarly situated doctors, there is also a likelihood of a chilling effect on the ability of indigent women who need abortions for "health" rather than "life" reasons, but who are unable to pay for them, to procure the needed services. As a consequence, there may be irreversible damage to their health. The importance of this consideration is not entirely abated by the possibility that the state courts might issue a preliminary injunction pending a decision on the statutory construction issues which appellants would raise.

There is also some doubt as to whether Illinois law provides these appellants with an "easy and ample" means of obtaining the necessary clarification of P.A. 80-1091. There is no Illinois procedure for certifying questions of state law to the state judiciary such as that present in *Bellotti* v. *Baird*, 428 U.S. at 150-51, 96 S.Ct. 2857. Appellants also point to uncertainties under Illinois law as to whether the Medicaid coverage provisions can be challenged in an action seeking "declaratory, injunctive, or class relief," [6] and

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[6] Appellants point to *Vickers* v. *Trainor*, 546 F.2d 739, 744 (7th Cir. 1976); *Chicago Welfare Rights Organization* v. *Weaver*, 56 Ill.2d 33, 305 N.E.2d 140 (1973), *app. dismissed, cert. denied*, 417 U.S. 962, 94 S.Ct. 3164, 41 L.Ed.2d 1135

whether they, as doctors, would have standing to assert the rights of their patients.[7] Appellees take the opposite position.[8] At a minimum the area is not one of settled Illinois law. These questions would not arise if appellants were to perform abortions of the type in question and seek state court review of any resulting denial of reimbursement. However, such a case by case approach would most likely engender long delays before the statutory standard could be sufficiently clarified. In short, the burden that absention would place on appellants and their patients is too great to be justified by the minimal benefits that absention would likely produce in terms of avoiding or materially altering the difficult constitutional questions raised in this case. We therefore conclude that the district judge's decision was in error.[9]

(1974); *People ex rel. Naughton* v. *Swank*, 58 Ill.2d 95, 317 N.E.2d 499 (1974); and *Ballew* v. *Edelman*, 34 Ill.App.3d 490, 340 N.E.2d 155 (1st Dist. 1975).

[7] Appellants cite *In re Estate of Karas*, 61 Ill.2d 40, 329 N.E.2d 234 (1975) (no right to assert constitutional rights of another in intestacy proceeding); *People* v. *Houston*, 43 Ill. App.3d 677, 357 N.E.2d 184 (1st Dist. 1976), *accord*: *People* v. *Sherrod*, 50 Ill.App.3d 532, 8 Ill.Dec. 607, 365 N.E.2d 993 (1st Dist. 1977); *Dept. of Revenue* v. *Continental Illinois Bank & Trust Co.*, 27 Ill.App.3d 326, 326 N.E.2d 453 (1st Dist. 1975).

[8] Appellees cite *Bio-medical Laboratories, Inc.* v. *Quern*, 68 Ill.2d 540, 370 N.E.2d 223 (1977), in rebuttal of the appellants' position on standing and suggest ways of distinguishing the cases cited by appellant on the second point.

[9] Appellants also assert that since their claim for relief is grounded on a federal statute as well as the United States

III.

Other Issues

In addition to seeking reversal of the district court's absention decision, appellants invite this court to proceed to resolve the merits of appellants' motion for a preliminary injunction. We respectfully decline. "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton* v. *Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976). Here we must reject appellants' argument that the district court denied appellants' motion for a preliminary injunction. The opinion of that court made it clear that that motion was "entered and continued pending institution and completion of appropriate proceedings in the Illinois state courts." In *Singleton* the Supreme Court found error in the Eighth Circuit's decision to reach the merits of the plaintiff's complaint after the district court had dismissed the cause for lack of standing. Although in the case at bar, we are asked to reach the substance of appellants' motion for a pre-

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Constitution, abstention would for that reason be improper. Although the Title XIX claim as well as the constitutional questions raised involves "a sensitive area of social policy," we believe that its existence reinforces our conclusion that abstention was inappropriate. *See Almenares* v. *Wyman*, 453 F.2d 1075, 1086 (2d Cir. 1971), *cert. denied*, 405 U.S. 944, 92 S.Ct. 962, 30 L.Ed.2d 815 (1972). However, since our conclusion as to the inappropriateness of abstention in this case was determined by other factors, we need not reach the question of whether the presence of the federal statutory claim *per se* makes *Pullman*-type abstention inappropriate.

liminary injunction rather than their complaint, we do not believe that it is necessary or appropriate to bypass the district court. The motion for a preliminary injunction raises the question of appellants' likelihood of prevailing on the merits. Although it is true that appellant's claims primarily pose problems of statutory construction and a judicial weighing of the substantiality and permissibility of state interests, these issues can best be resolved in the context of a record developed in a hearing in the district court. This court, if necessary, can then properly perform its function of reviewing the exercise of the equitable discretion of the district judge. It canot be denied that this separation of judicial functions may at times lead to added delay and expense, but any question of irreparable injury to the appellants or their patients can be presented to the district court in the form of a motion for a temporary restraining order. We intimate no view, however, on the merits of the relief appellants seek.

At oral argument appellee Quern raised the question of appellants' standing to assert the rights of their patients. We believe that this issue too should first be dealt with at the district court level. The question has not been fully briefed here. Our references in this opinion to the doctors' assertion of the rights of their patients are not to be construed as an implicit resolution of the question of whether they are legally entitled to do so.

The decision of the district court is reversed and the case is remanded with instructions that the

plaintiff-appellants' motion for a temporary restraining order and/or preliminary injunction is to be expeditiously taken under consideration. The injunction pending appeal issued by this court on January 11, 1978 is dissolved.

APPENDIX F

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 77 C 4522

DAVID ZBARAZ, M.D., ET AL., PLAINTIFFS

v.

ARTHUR F. QUERN, ETC., DEFENDANTS

MEMORANDUM OPINION AND ORDER

Plaintiff's motion for a temporary restriaing order and/or preliminary injunction is entered and continued pending institution and completion of appropriate proceedings in the Illinois state courts. See Lake Carriers Association v. MacMillan, 406 U.S. 511 (1972).

ENTER:

ALFRED Y. KIRKLAND
Judge

DATED: December 21, 1977

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 77 C 4522

DAVID ZBARAZ, M.D., ET AL., PLAINTIFFS

v.

ARTHUR F. QUERN, ETC., DEFENDANTS

NOTICE OF APPEAL

Notice is hereby given that the federal defendant-intervenor appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. § 1252, from that portion of the Final Judgment and Order dated April 30, 1979, and docketed May 2, 1979, granting partial summary judgment to the plaintiffs, in the United States District Court for the Northern District of Illinois.

Dated at Chicago, Illinois, this 25th day of May, 1979.

Respectfully submitted,

/s/ Barbara Allen Babcock
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Assistant Attorney General
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